(4)

No. 87-636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EFTHIMIOS A. KARAHALIOS,

Petitioner,

v.

DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed October 5, 1987
Certiorari Granted June 6, 1988

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The following opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear in the appendix to the printed Petition for Certiorari:

Opinion of the United States Court of Appeals for the Ninth Circuit, dated July 13, 1987

RELEVANT DOCKET ENTRIES

Date	*Relevant Entry*
6-29-1981	Complaint for damages filed with District Court (Northern District of California)
9-17-1981	Defendant Defense Language Institute's motion to dismiss filed with District Court
10-15-1981	First amended complaint for damages filed with District Court
11-5-1981	Defendant Local 1263's motion to dismiss filed with District Court
1-8-1982	Defendant Defense Language Institute's memorandum in support of motion to dismiss filed with District Court
3-9-1982	Order of District Court denying defendant Local 1263's motion to dismiss for lack of subject matter jurisdiction, and granting defendant Defense Language Institute's motion to dismiss, with leave to amend, entered
7-23-1982	Order of District Court denying defendant's motion for reconsideration entered
12-20-1982	Defendant Defense Language Institute's motion for summary judgment filed with District Court
3-9-1983	Defendant Defense Language Institute's reply brief to plaintiff's opposition to defendants' motions for summary judgment filed with District Court

Date	*Relevant Entry*
8-30-1983	Order of District Court granting defendant Defense Language Institute's motion for summary judgment and denying defendant Local 1263's motion for summary judgment
12-31-1984	Findings of fact and conclusions of law entered in the District Court
12-31-1984	District Court judgment entered
1-28-1985	Notice of appeal from judgment by defendant Local 1263 filed in Ninth Circuit Court of Appeals
2-4-1985	Notice of appeal from judgment denying plaintiff back pay and from the final judgment dismissing defendant Defense Language Institute, filed by plaintiff in Ninth Circuit Court of Appeals
4-5-1985	Order from Ninth Circuit Court of Appeals consolidating appeals entered
5-13-1985	Order from Ninth Circuit Court of Appeals entered staying appeal until District Court's decision on attorneys' fees
6-28-1985	Order from Ninth Circuit Court of Appeals continuing stay of appeal entered
4-1-1986	Order re attorneys' fees entered in District Court
4-28-1986	Notice of appeal from order re attorneys' fees entered

Date	*Relevant Entry*
4-28-1986	Order from Ninth Circuit Court of Appeals consolidating all appeals from District Court
6-30-1986	Brief of appellant Local 1263 filed in Ninth Circuit Court of Appeals
8-25-1986	Brief of appellee and cross-appellant Karahalios filed in Ninth Circuit Court of Appeals
7-1-1986	Brief of *Amicus Curiae*, American Federation of Government Employees, filed in Ninth Circuit Court of Appeals
10-6-1986	Reply brief of appellant Local 1263 filed in Ninth Circuit Court of Appeals
4-16-1987	Oral argument in Ninth Circuit Court of Appeals
7-13-1987	Opinion of Ninth Circuit Court of Appeals filed
7-13-1987	Order of Ninth Circuit Court of Appeals reversing District Court and dismissing case entered

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EFTHIMIOS A. KARAHALIOS Plaintiff, vs. DEFENSE LANGUAGE INSTITUTE-FOREIGN LANGUAGE CENTER PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES, Defendant.	No. C 81 2745 RFP (Labor Relations) FIRST AMENDED COMPLAINT FOR DAMAGES

Plaintiff, Efthimios A. Karahalios, alleges:

JURISDICTION

1. This court has jurisdiction pursuant to 28 USC § 1331.

PARTIES

2. Defendant Defense Language Institute-Foreign Language Center Presidio of Monterey (hereinafter referred to as defendant ("DLI") is an agency of the United States Department of Defense which provides instruction in foreign languages to United States military and civil-

ian personnel. Defendant DLI is an "agency" within the meaning of 5 USC § 7103(a)(3).

3. Defendant Local 1263, National Federation of Federal Employees, (hereinafter referred to as defendant ("Union") is a "labor organization" within the meaning of 5 USC § 7103(a)(3) and is the "exclusive representative", within the meaning of 5 USC § 7103(a)(16), of the professional employees of defendant DLI, including plaintiff herein.

3.[*sic*] Plaintiff is employed by defendant DLI as an instructor in the Greek language, which position is classified as GS-1712-9. This action arises out of plaintiff's demotion by defendant DLI from the position of course developer, classified as GS-1712-11.

COLLECTIVE BARGAINING AGREEMENTS

4. The defendants are parties to collective bargaining agreements dated May 5, 1976 and May 15, 1978 respectively. Said agreements govern the conditions of employment, during the time periods material to this action, for all employees of defendant DLI who are represented by defendant Union, including the plaintiff herein. Among other things, each agreement contains detailed provisions governing employee discipline, grievance procedures and arbitration. Those portions of the agreement of May 5, 1976 entitled "Discipline", "Grievances" and "Arbitration" (Articles XVI, XVII and XVIII respectively) are set forth as "Exhibit 1" in support of this complaint. Those portions of the agreement of May 15, 1978 entitled "Grievances", "Arbitration" and "Discipline", (Articles VI, VII and XXII respectively) are set forth as "Exhibit 2" to this complaint.

PLAINTIFF'S GRIEVANCE

5. Prior to the events herein complained of, plaintiff was promoted from instructor (pay grade GS-9) to course developer (pay grade GS-11). Plaintiff's qualifications as course developer and his performance as course developer are not, and have never been, in issue.

6. Shortly after plaintiff became course developer, another DLI instructor, Simon Kuntelos, not a party to this action, filed a grievance, claiming that Kuntelos was improperly not considered for the position of course developer.

7. Mr. Kuntelos was, at all times herein mentioned, a member of defendant Union, and sat on the Board of Directors of defendant Union.

8. Plaintiff is not, and never has been, a member of defendant Union.

9. The relief requested by Mr. Kuntelos was denied in all stages of the grievance procedure. Thereafter defendant Union demanded arbitration on behalf of Mr. Kuntelos.

10. Arbitration proceedings were had before Alvin L. Goldman, Arbitrator, on June 22, 1977, in the *Matter of the Arbitration Between Defense Language Institute and the National Federation of Federal Employees, Local 1263* (FMCS No. 77K14006, Kuntelos Grievance). An award was rendered on August 4, 1977, directing that "the vacancy for the course developer position at issue be declared reopened and the procedure for filling that position be reconstituted." A copy of the arbitration award is set forth as "Exhibit 3" in support of this complaint.

11. At all stages of the Kuntelos grievance, Mr. Kuntelos was represented by defendant Union. In the Kuntelos arbitration, defendant Union was itself a party. Plaintiff was not a party to the Kuntelos arbitration proceedings, was not notified of the pendency of the proceedings, and had no opportunity to appear and be heard therein. Throughout the Kuntelos proceedings, defendant Union actively advocated a position adverse to the interests of plaintiff.

12. On February 21, 1978, defendant DLI first notified plaintiff of the arbitration award, advising plaintiff that the award might result in a demotion.

13. On April 6, 1978, defendant DLI notified plaintiff in writing of a proposed demotion to instructor (pay grade GS-9). On May 5, 1978, defendant DLI gave plaintiff a written decision of the Commandant demoting petitioner, effective May 7, 1978. Copies of the April 6, 1978 Proposed Change to Lower Grade and May 5, 1978 Decision on Change to Lower Grade are set forth as "Exhibits 4 and 5" in support of this complaint.

14. Ever since May 7, 1978, plaintiff has been an instructor (pay grade GS-9). The demotion represents a substantial loss to plaintiff in salary and retirement benefits, as hereinafter alleged.

15. Mr. Kuntelos was given the position of course developer.

16. On May 11, 1978, plaintiff filed a formal grievance in accordance with the grievance procedures as provided in the then effective collective bargaining agreement, seeking permanent reinstatement to the position of course developer (pay grade GS-11), alleging that the

demotion was improper and also alleging certain procedural irregularities in connection with the April 6, 1978 Notice of Proposed Adverse Action. A copy of the grievance of May 11, 1978 and supporting documents is set forth as "Exhibit 6" in support of this complaint.

17. On October 12, 1978, plaintiff filed a second formal grievance, again seeking permanent reinstatement to the position of course developer, alleging that the demotion was without just cause and further alleging procedural irregularities in connection with the selection of Mr. Kuntelos to fill the course developer position—in particular, that different standards were used for testing Mr. Kuntelos than plaintiff. A copy of the grievance of October 12, 1978 and supporting documents is set forth as "Exhibit 7" in support of this complaint.

18. Both grievances of plaintiff were treated by all parties as a single grievance, to be heard and determined by the Commandant in accordance with the grievance procedures of the collective bargaining agreement. On December 20, 1978, the Commandant formally denied petitioner's grievances. A copy of the Commandant's Decision of December 20, 1978 is set forth as "Exhibit 8" in support of this complaint.

19. Thereafter, plaintiff requested defendant Union to invoke arbitration in accordance with the arbitration procedures of the collective bargaining agreement. On January 9, 1979, defendant Union notified plaintiff that defendant Union would not invoke arbitration on his behalf, on the grounds of the Union's conflict of interest. The letter from defendant Union of January 9, 1979 to plaintiff is set forth as "Exhibit 9" in support of this complaint. That letter provides in part:

> "If a grievance is carried further seeking to obtain the position which you seek, it will conflict with the Arbitrator Goldman's original award since the current holder of this position was represented by the Union, and therefore, obtained the position through the same legality which you want to seek. In other words, in a situation where there are two persons seeking one existing position, the Union cannot represent both. Prior to the filing of your grievance, the Union actively represented the present incumbent."

20. On January 17, 1979, plaintiff demanded arbitration against both defendant DLI and defendant Union. A copy of the demand for arbitration dated January 17, 1979 is set forth as "Exhibit 10" in support of this complaint. Both defendants refused to arbitrate the grievance.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

21. On May 16, 1979, plaintiff filed formal unfair labor practices charges against both defendant DLI and defendant Union. The charges were filed with the Federal Labor Relations Authority pursuant to 5 USC § 7118. A copy of the Federal Labor Relations Authority Charge Against Agency (Case No. 9-CA-53) and of the Federal Labor Relations Authority Charge Against Labor Organization Or Its Agents (Case No. 9-CO-5) are set forth as "Exhibits 11 and 12" in support of this complaint.

22. The Regional Director, Region 9, Federal Labor Relations Authority determined not to file unfair labor practices complaints against either defendant DLI or defendant Union. The Regional Director's "dismissal letter" of January 10, 1980 is set forth as "Exhibit 13" in support of this complaint.

23. On January 24, 1980, plaintiff filed a Request for Review of the Regional Director's adverse decision in the office of the General Counsel, Federal Labor Relations Authority. A copy of the Request for Review is set forth as "Exhibit 14" in support of this complaint, and a copy of plaintiff's Supplement to Request for Review dated February 5, 1980 is set forth as "Exhibit 15" in support of this complaint.

24. On June 17, 1980, the office of the General Counsel decided to affirm the Regional Director's decision with respect to the unfair labor practices charge against defendant DLI, but to reverse the Regional Director's decision with respect to the unfair labor practices charge against defendant Union, remanding the matter to the Regional Director "to issue a complaint in this matter, absent settlement". A copy of the General Counsel's decision of June 17, 1980 is set forth as "Exhibit 16" in support of this complaint.

25. Following the remand from the office of the General Counsel, the Regional Director entered into a settlement agreement with defendant Union providing only for the posting of a notice by defendant Union to the effect that defendant Union would not in the future ". . . inform employees that where two or more employees are seeking one position, the Union . . . cannot represent all such employees in the contractual grievance procedure". The settlement agreement did not provide any relief for plaintiff nor did it provide for a hearing on the merits of petitioner's grievance either by arbitration or otherwise. Copies of the settlement agreement and notice are together set forth as "Exhibit 17" in support of this complaint.

26. Following the Regional Director's settlement with defendant Union, plaintiff filed a second Request for Review with the office of the General Counsel, Federal Labor Relations Authority, on August 27, 1980, objecting to the proposed settlement and seeking an order requiring an arbitration of plaintiff's grievance. At the same time, plaintiff requested reconsideration of the General Counsel's adverse decision affirming the Regional Director's actions with respect to the charge against defendant DLI. A copy of plaintiff's Request for Review and Request for Reconsideration dated August 27, 1980 is set forth as "Exhibit 18" in support of this complaint.

27. On November 24, 1980, the General Counsel denied reconsideration in case number 9-CA-53, the charge against defendant DLI. A copy of the General Counsel's decision is set forth as "Exhibit 19" in support of this complaint.

28. On November 26, 1980, the General Counsel denied review in case number 9-CO-5, the charge against defendant Union.

29. Plaintiff has exhausted his administrative remedies.

FIRST CAUSE OF ACTION

30. By refusing to arbitrate plaintiff's grievance, defendant Union breached its duty of fair representation to plaintiff.

SECOND CAUSE OF ACTION

31. By refusing to arbitrate plaintiff's grievance, defendant DLI breached the collective bargaining agreements alleged in paragraph 4 of this complaint.

THIRD CAUSE OF ACTION

32. By defendant DLI's proceeding to arbitrate regarding plaintiff's job without notice to plaintiff, or providing plaintiff an opportunity to be heard, plaintiff was unconstitutionally deprived of property without due process of law as provided by the Fifth Amendment and the Fourteenth Amendment of the United States Constitution.

FOURTH CAUSE OF ACTION

33. The collective bargaining agreement as applied by defendant DLI violates the equal protection clause of the Fourteenth Amendment of the United States Constitution in that it denies the ability to proceed to arbitration to those employees who cannot be represented at the arbitration by their collective bargaining representative, and, as applied, effectively denies collective bargaining representation to such employees.

34. At the time of plaintiff's demotion as herein alleged plaintiff's annual salary was $18,763.00, the salary for pay grade GS-9, step 10.

35. There are ten "steps" within each of pay grades GS-9 and GS-11. Immediately following plaintiff's demotion, plaintiff was already in the highest "step" within pay grade GS-9, and had no possibility of future step increases. Immediately prior to plaintiff's demotion, plaintiff was at step 4 within pay grade GS-11, and, but for the demotion, plaintiff would have been entitled to step increases in salary within pay grade GS-11.

36. Since plaintiff's demotion, there have been cost-of-living increases in salary for both pay grades GS-9 and GS-11. The cost-of-living raises have further widened the

gap between plaintiff's actual salary and the salary which plaintiff would have received but for his demotion.

37. Plaintiff is a member of the Civil Service Retirement System, in which retirement benefits are calculated based upon the so-called "high three", being the average salary received by a member for the three years of qualified service in which the member's salary was highest. But for plaintiff's demotion, plaintiff's "high three" will be lower than it would have been, and plaintiff's retirement benefits will accordingly be lower.

38. Retirement benefits are periodically adjusted based on the cost-of-living, which adjustments will further widen the gap between plaintiff's retirement benefits and the benefits which he would have received but for the demotion.

39. Plaintiff has retained attorneys to represent him in connection with administrative proceedings and with this litigation, and plaintiff has incurred expenses for legal fees and related costs. The total amount of said fees and costs is not yet known to plaintiff.

RELIEF SOUGHT

WHEREFORE plaintiff prays this court for judgment in favor of plaintiff and against defendant Defense Language Institute-Foreign Language Center, Presidio of Monterey, and against defendant Local 1263, National Federation of Federal Employees, as follows:

1. Against defendants and each of them, for damages equal to the amount of pay which plaintiff lost as herein alleged, together with interest on said sum from May 7, 1978 until paid, and for damages for the diminution of plaintiff's retirement benefits as herein alleged.

2. Against defendants and each of them, for plaintiff's attorneys' fees according to proof.

3. Against defendants and each of them for costs of suit herein.

4. For such other and further relief as the court deems proper.

DATED: October 11, 1981

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By /s/
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EFTHIMIOS A. KARAHALIOS, Plaintiff, vs. DEFENSE LANGUAGE INSTITUTE–FOREIGN LANGUAGE CENTER PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES, Defendant.	Case No. C 81 2745 RFP PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Monterey, State of California; I am over the age of eighteen (18) years and not a party to the above-referenced action. My business address is 335 El Dorado, Suite 7, Monterey, California 93940. On October 13, 1981, I served the FIRST AMENDED COMPLAINT FOR DAMAGES in the above-referenced action on attorneys of record by placing true copies thereof in a sealed envelope and mailing same to the following addresses by United States mail with postage thereon fully prepaid:

Mark Chavez, Esq.
United States Department of Justice
Civil Division, Room 3728
Ninth & Pennsylvania Ave. N.W.
Washington, D.C. 20530

Saul Weingarten, Esq.
SAUL M. WEINGARTEN, INC.
Fremont Professional Center
Fremont Blvd. & Williams Ave.
Seaside, CA 93955

I, Celeste Ayers, declare under penalty of perjury that the foregoing is true and correct.

Executed on October 13, 1981, at Monterey, Monterey County, California.

/s/ Celeste Ayers
Celeste Ayers

ARTICLE XVI
DISCIPLINE

Sec. 1. GENERAL. It is agreed that the most effective means of maintaining discipline is through management and Union promotion of cooperation, of sustained good working relationships, and of the self-discipline and responsible performance expected of mature employees. In those cases where specific corrective action becomes necessary, the disciplinary measures taken should have a constructive effect. Disciplinary action will be taken for the purpose of correcting offending employees and problem situations and maintaining discipline and morale among all employees.

Sec. 2. TYPES OF DISCIPLINARY ACTIONS.

A. Informal disciplinary actions such as oral admonitions or written warnings will generally be taken in situations involving minor violations of a rule, regulation, standard of conduct, safety practice, or authoritative instruction.

B. Formal disciplinary actions include written reprimands, suspensions, demotions, and removals and will be taken only for just cause and in accordance with DA and CSC regulations.

Sec. 3. REPRESENTATION.

A. It is agreed that the informal resolution of disciplinary problems is in the best interest of the Employer, the Union and employees. In order to preclude the development of adversary proceedings which would be detrimental to the desired goal of informal resolution of potential disciplinary action, an individual representative will not

be permitted at an informal meeting between an employee and the supervisor. However, nothing herein shall preclude a supervisor from requesting the presence of a Union steward or officer at informal meetings if in the judgment of the supervisor, his presence may facilitate the resolution of the problem.

B. Supervisors or management officials may conduct preliminary investigations into alleged misconduct prior to proposing disciplinary actions. Meetings between supervisors or management officials and employees pursuant to this paragraph are informal meetings.

C. For the purposes of this Article, a formal meeting shall be defined as a meeting where potential discipline is to be discussed and two or more management officials are present with the affected employee. Employees are entitled to request representation in such meetings.

D. Following notification of proposed formal disciplinary action, an employee is entitled to be represented by a person of choice during all subsequent related proceedings. Such representation is authorized in order to permit the employee the maximum opportunity to respond to the charges in a complete and effective manner. This right to representation by a person of choice does not extend to grievances filed over receipt of formal disciplinary action. When such a grievance is filed, employees may be represented only by themselves or the Union.

E. The Employer agrees that in all formal disciplinary actions the employee will be furnished with an extra copy of the notice of proposed disciplinary action and the notice of decision which may be given to the employee's representative. The copies will be annotated "Representative's Copy".

Sec. 4. PROBATIONARY EMPLOYEES. It is recognized that the one year probationary period through which all new DLI employees must pass, is an extension of the initial examining process wherein the employee's suitability for continued employment is subjected to careful scrutiny by management. Accordingly, probationary employees are not entitled to the same job protection rights flowing to non-probationary, permanent employees. Specifically, grievances filed by or on behalf of probationary employees which contest the propriety of disciplinary action, will not be subject to the arbitration process.

Sec. 5. TEMPORARY EMPLOYEES. It is recognized that employees serving on temporary appointments with definite time limitations or intermittent appointments, are employed solely for the purpose of meeting a temporary or intermittent need and are not entitled to the full job protection rights afforded to permanent employees. Specifically, grievances filed by or on behalf of temporary or intermittent employees which contest the propriety of disciplinary action, will not be subject to the arbitration process.

Sec. 6. GRIEVANCES. Grievances contesting the propriety of formal disciplinary action may be filed by the effected [*sic*] employee not sooner than the employee's receipt of the notice of decision but not later than 5 working days after the effective date of the action or return to duty from suspension. The grievance will normally be initiated at Step 2 of the grievance procedure unless there are no officials organizationally situated between the Commandant and the official that signed the notice of decision. In that case, the grievance will be initiated at Step 3.

Sec. 7. PROCEDURAL REQUIREMENTS. When formal disciplinary action is sought against permanent, non-probationary employees, they are entitled to:

A. An advance written notice stating the reasons, specifically and in detail, for the proposed action;

B. A reasonable time for answering the notice of proposed action personally and in writing and for furnishing affidavits in support of the answer;

C. A written notice of decision at the earliest practicable date which informs the employee of the reasons for the action together with pertinent grievance and appeal rights.

ARTICLE XVII
GRIEVANCES

Sec. 1. GENERAL. The grievance procedure agreed upon herein by the Parties shall be the sole procedure, applicable only to the Employer, the Union and employees in the units, for the consideration of grievances. For the purposes of this collective bargaining agreement, a grievance shall be defined as any dissatisfaction, dispute or complaint by an employee or the Union against the Employer concerning personnel policies, practices, or working conditions which are within the scope of authority of the Employer or, complaints by the Employer against the Union. Such matters may include but are not necessarily limited to the following:

A. Interpretation and application of the terms of this collective bargaining agreement;

B. The application of DLI regulations, Department of Army (DA) regulations or the regulations of other appropriate authority;

C. Personal dissatisfactions with working conditions or relationships.

Sec. 2. EXCLUSIONS. Matters excluded from consideration under the grievance procedure include, but are not necessarily limited to the following:

A. Any matter for which a statutory appeals procedure exists;

B. Questions as to interpretation of published DA policies or regulations, provisions of law, or regulations of appropriate authorities outside DA regardless of whether such policies, laws, or regulations are quoted, cited, or otherwise incorporated or referenced in this Agreement;

C. Non-selection for placement or promotion from a group of properly ranked and certified candidates;

D. Frivolous or facetious matters;

E. Notices of proposed disciplinary actions;

F. Informal disciplinary actions as defined in Article XVI;

G. Matters for which no form of personal relief to the employee is appropriate;

H. Complaints pertaining to matters excluded from management's obligation to consult or confer with the Union;

I. Non-adoption of suggestions or disapproval of honorary or discretionary awards.

Sec. 3. GRIEVABILITY. Disputes as to whether a matter is grievable or arbitrable under the provisions of this Agreement, if not resolved by the Parties, may be

referred to arbitration for a decision under the provisions of Article XVIII or referred to the Assistant Secretary of Labor for Labor-Management Relations for decision in accordance with pertinent rules and regulations.

Sec. 4. REPRESENTATION. If an employee or group of employees desire representation in filing a grievance under this grievance procedure, they may be represented only by the Union or themselves. Any employee or group of employees choosing to represent themselves may present such grievances to the Employer and have them adjusted without the intervention of the Union, as long as the adjustment is not inconsistent with the terms of this Agreement and the Union has been given the opportunity to be present at the adjustment. The right of employees to present their own grievances does not extend to use of the arbitration process (Article XVIII). Designation of Union representatives and their use of official time shall be governed by the provisions of Article IV, Sections III and IV.

Sec. 5. The Union and the Employer agree that it is in their mutual interest to resolve grievances at the lowest possible level. With this principle in mind, the Union, unit employees and management will cooperate fully in the investigatory and processing stages of any grievance. Furthermore, the Union agrees to actively discourage employees from filing grievances over frivolous of [*sic*] facetious matters.

Sec. 6. When presenting a greivance [*sic*] under these procedures, the aggrieved will initiate the grievance at the first step unless the Parties mutually agree to initiate the grievance at a higher step or if other provisions in this Agreement dictate otherwise.

Sec. 7. If two or more unit employees requesting representation by the Union have substantially identical grievances and wish to pursue them under Sec. 9. of this Article, the Union shall select one employee's grievance for processing and the outcome of that grievance will be binding on the other employee(s) concerned. When the provisions of this section are to be invoked, the Union will so notify the Employer in writing concurrent with the initiation of the formal grievance. Such written notification will include the names of all grievants together with the name of the employee whose grievance will be pursued through the formal process.

Sec. 8. FORMAT FOR WRITTEN GRIEVANCES AND DECISIONS. To assure that sufficient information is provided to the Union, employees, and management officials when utilizing the grievance procedures outlined herein, forms developed by the Parties and provided by the Employer will be utilized when submitting a written grievance or a written decision on a grievance. These forms may be modifeid [*sic*] upon mutual consent of the Parties without reopening this Agreement. Employee grievance forms may be obtained from supervisors, the Office of Civilian Personnel and Union stewards and officers.

Sec. 9. EMPLOYEE GRIEVANCE PROCEDURE.

Step 1. The grievance shall be taken up orally and discussed between the aggrieved and the appropriate supervisor (normally the immediate supervisor) within 10 work days from the date the employee becomes aware of the incident or decision giving rise to the grievance and attempts will be made to resolve the matter informally. The grievant will normally be represented by the area

steward or alternate, if representation is desired. It is expected that most employee grievances will be resolved at this level and management and the Union agree to promote this concept vigorously. If the grievant's dissatisfaction has not been resolved through this informal discussion, a formal grievance may be initiated within 5 work days by completing and submitting a written grievance to the Step 1 official. Within 5 work days, the supervisor will meet with the grievant and the Union representative (normally the area steward if representation is desired) and any other individuals the supervisor feels may be of assistance in attempting to resolve the grievance. A written decision on the grievance will be provided to the employee and the representative, if any, within 10 work days after receipt of the written grievance.

Step 2. If the grievance is not resolved at Step 1, the written grievance along with the written decision may be presented within 5 work days of the employee's receipt of the written decision from Step 1 to the next level supervisor for processing. This supervisor will be responsible for promptly forwarding the grievance to the appropriate official for action. Within 5 work days of receipt, the designated official will meet with the grievant, the Union representative (normally the steward if representation is desired) and anyone else the official feels may be of assistance in attempting to resolve the grievance. The written decision will be rendered within 10 work days after conclusion of the meeting(s).

Step 3. If the dissatisfaction is not settled at Step 2, the written grievance may be forwarded within 5 work days of the grievant's receipt of the Step 2 decision, together with the decisions from Step 1 and 2, through the Chief,

Office of Civilian Personnel to the DLI Commandant for consideration and decision. The Commandant will arrange for whatever review and investigation he deems necessary and will provide the aggrieved and the designated Union representative, if any, his written decision within 15 work days of receipt of the grievance in the Office of Civilian Personnel. In addition to the appropriate area steward, a Union official may also accompany the grievant in any discussion held between the Commandant or his designee and the grievant.

Sec. 10. UNION GRIEVANCES. A Union grievance is defined as a dispute over the interpretation or application of this Agreement where no form of relief that is personal to a unit employee is appropriate. A Union grievance shall be submitted in writing (which shall substantially follow the format of an employee grievance) by the Union president or his designee with [*sic*] 15 work days of the date he became aware of the incident or decision giving rise to the grievance. The grievance may be processed beginning with Step 3.

Sec. 11. EMPLOYER GRIEVANCES. An Employer grievance over the interpretation or application of this Agreement shall be submitted by the DLI Commandant or his designee in writing to the Union president within 15 work days of the date he became aware of the incident or decision giving rise to the grievance. The Union president will meet with the Commandant or his designee within 5 work days of his receipt of the grievance and attempt to resolve the dispute. The Union president will notify the DLI Commandant of his decision in writing within 10 work days of the meeting.

Sec. 12. In the event satisfactory resolution of the grievance is not achieved through the proceedings outlined in

Sections 9, 10 and 11, the Union or the Employer may, within 10 work days of the final written decision, elect to have the grievance settled by arbitration through the procedures in Article XVIII. The right of employees to present their own grievance does not extend to invoking arbitration.

Sec. 13. TIME LIMITS. In processing a grievance, the time limits will be strictly observed by both Parties. Failure of the Employer or the Union to observe the time limits shall entitle the other party to advance the grievance to the next step or stage. Failure by the aggrieved to present his grievance within the time limits at any step in this Article so that the grievance is not timely received by the individual specified in these procedures will result in the termination of the grievance, and it will be returned to the aggrieved with the reason for its termination. A written request, however, for extension of the time limits may be granted in unusual circumstances, if mutually agreed upon by the Parties.

ARTICLE XVIII
ARBITRATION

Sec. 1. GENERAL. If the Employer and the Union fail to settle any grievance processed under the negotiated grievance procedure, either party may within 10 work days after receipt of the final decision, notify the other party of a request to invoke arbitration.

Sec. 2. SELECTION PROCEDURES. Within 5 work days from the date of the request for arbitration the Parties shall meet and make a good faith attempt to develop a mutually acceptable stipulation of the issue(s). If unable to agree on a stipulation of issues, each Party will

prepare his own and the selected arbitrator shall be empowered to frame the issue, taking into consideration the positions of the Parties and the terms of this Agreement. Within 10 work days of the request, the Parties shall jointly submit a request for a list of at least 5 impartial persons qualified to act as arbitrators, together with the stipulation(s) of the issue(s) to the Federal Mediation and Conciliation Service (FMCS) or other mutually agreeable source. Within 5 working days of receipt of the list of arbitrators the Parties will conduct a telephonic survey to determine availability, costs, etc. If, after completion of the survey, the Parties cannot mutually agree upon one of the listed arbitrators, the Employer and the Union will each strike one arbitrator's name from the list and repeat this procedure until only one name is left, who shall be the duly selected arbitrator. The method for determining who strikes first shall be by coin toss (the official who selects the face up side of the coin shall make the first strike). If for any reason either Party refuses to participate in the selection of an arbitrator and all requirements for arbitration in this Agreement are satisfied, the FMCS shall be empowered to make a direct designation of an arbitrator to hear the case.

Sec. 3. STIPULATION OF FACTS. Following completion of the selection process, the Parties will prepare a stipulation of facts which will be fowarded [*sic*] to the arbitrator prior to the commencement of the hearing. The stipulation of facts will normally include a copy of this Agreement, the written grievance from each step, the written decision from each step, the stipulation(s) of the issue(s), and any other mutually agreeable documents.

Sec. 4. SCOPE OF AUTHORITY. The arbitrator is empowered to rule on the interpretation and application

of this Agreement and on the application of pertinent laws and regulations of appropriate authority. This authority, however, does not extend to the interpretation of such laws and regulations. The arbitrator shall have no power to add to or subtract from, disregard or modify any of the terms of this Agreement and the award must be fully consistent with all pertinent laws, Executive Orders and regulations of higher authority. The arbitrator shall have no authority to substitute his judgment for that of the Employer as to reasonableness of existing rules and regulations of the Employer and shall be limited to deciding whether the facts established by the Parties justify the action of the Employer as being within the reasonable exercise of management discretion.

Sec. 5. COSTS. The arbitrator's fee and other expenses related to the arbitration hearing shall be borne equally by the Employer and the Union. The cost of a verbatim transcript, if any, will be borne by the requesting Party(s) unless requested by the Arbitrator in which case the costs will be shared equally. The arbitration hearing will be held in facilities made available by the Employer during the regular day shift hours (0745-1645) Monday through Friday, insofar as it is practicable.

Sec. 6. DUTY STATUS. The aggrieved, the Union representative, and the aggrieved's witnesses approved by the arbitrator who are otherwise in duty status shall be excused from duty to participate in the arbitration hearing without loss of pay or charge to annual leave.

Sec. 7. TIMELINESS. The arbitrator will be requested by the Parties to render his decision as quickly as possible but in any event no later than 30 calendar days after the conclusion of the hearing unless the Parties agree otherwise.

Sec. 8. EXCEPTIONS. The arbitrator's decision will be binding on the Parties. However, either Party may file exceptions to the arbitrator's award with the Federal Labor Relations Council under regulations prescribed by the Council and other appropriate authority.

Sec. 9. APPLICABILITY. The provisions of this Article shall not be applicable to probationary employees, intermittent employees, or employees serving under time-limited appointments.

Sec. 10. PRECEDENT. While it is recognized that past published arbitration decisions may serve as a useful guide to the arbitrator concerning reasoning used and principles enunciated, because of the dynamic nature of the Federal labor-management relationship, each case should be judged on its individual merits.

ARTICLE VI
GRIEVANCES

Section 1. General Goals. The Employer and the Union recognize the importance of settling disagreements and disputes promptly, fairly, and in an orderly manner that will maintain the self-respect of the employee and be consistent with the principles of good management. To accomplish this, every reasonable effort will be made to settle grievances expeditiously and at the lowest level of supervision.

Section 2. Scope. The grievance procedure agreed upon herein by the Parties shall be the sole procedure available to the Union and unit employees for the consideration of complaints over the interpretation or application of this Agreement or complaints over personnel policies,

practices, and conditions of employment which affect unit employees and their employment. In accordance with Section 13. of E. O. 11491, as amended, the Employer may also utilize the grievance procedure to resolve disputes over interpretation or application of the Agreement.

Section 3. Exclusions. Matters excluded from consideration under the grievance procedure include, but are not necessarily limited to the following:

A. any matter for which a statutory appeals procedure exists (see Appendix B for sample listing);

B. non-selection for placement or promotion from a group of properly ranked and certified candidates;

C. complaints pertaining to matters excluded from management's obligation to consult or confer with the Union;

D. non-adoption of suggestions or disapproval of honorary or discretionary awards.

Section 4. Grievability. Disputes as to whether a matter is grievable or arbitrable under the provisions of this Agreement, if not resolved by the Parties, may be referred to arbitration for a decision under the provisions of Article VII or referred to the Assistant Secretary of Labor for Labor-Management Relations for decision in accordance with pertinent rules and regulations. In the event of a dispute between the Parties that could be subject to both the grievance procedure and the procedures of Section 19 of Executive Order 11491 as amended, the grievance procedure shall be utilized.

Section 5. Representation. Only the Union or a representative approved by the Union may represent employees in grievances. However, any employee or group of em-

ployees may present a grievance and have it adjusted without the intervention of the Union provided that the Union shall have the right to have a representative present at all discussions with the grievant unless the grievant objects for reasons of privacy. In any case, the Union shall have the right to have a representative present at the adjustment and the adjustment must be consistent with the terms of this Agreement. If an employee is represented by the Union in a grievance, a meeting with the employee on the grievance will not be held without giving the Union an opportunity to be present. In exercising their right to present a grievance, employees and their representatives shall be unimpeded and free from restraint, coersion [*sic*], discrimination, or reprisal.

Section 6. Access to Records. The Employer will, upon request, furnish an aggrieved employee and the designated representative, information from grievant's official personnel records which have a direct bearing on the grievance. In addition, they will be provided full access to and where reasonable, extracts or copies of all relevant personnel regulations and official directives.

Section 7. Time Limits. In processing a grievance, the time limits will be strictly observed by both Parties. Failure of the Employer or the Union to observe the time limits shall entitle the other Party to advance the grievance to the next step or stage. Failure by an aggrieved employee to present the grievance within the proper time limits will result in termination of the grievance. A written request for an extension of the time limits may be granted upon mutual consent of the Parties.

Section 8. Informal Grievance. The informal grievance shall first be taken up by the grievant and steward if he/she elects to have representation, either orally or in

writing with the lowest level management official who has authority to render a decision (see Section 10.). The informal grievance must be presented within (15) fifteen work days of the date the employee first became aware of the grievance. A decision will be given to the grievant within five (5) work days after presentation of the informal grievance. The decision shall be in writing if the informal grievance is presented in writing.

Section 9. Formal Grievance.

Step 1. If the matter is not satisfactorily settled following the informal stage, grievant may within 5 work days after the informal decision, submit the matter in writing on a standard grievance form to the next level official. The grievance should clearly identify the grievant, the nature of dissatisfaction, provisions of the Agreement alleged to have been violated (if any) and the personal relief sought. The official will meet with the grievant(s) and the steward (if representation is desired) within (5) five work days after receipt of the grievance. The official shall give the grievant and his/her representative the written answer along with documents submitted by the grievant within (5) five work days after the meeting(s).

Step 2. If the matter is not satisfactorily settled at the first step, grievant may within 5 work days after the step 1 decision advance the grievance to the next level official.

The written grievance will be accompanied by the step 1 grievance and decision together with any other additional material which has a bearing on the issue. The official will meet with the grievant(s) and the steward within 5 work days of receipt of the grievance. The written decision will be rendered within 10 work days after the meeting(s), and will be accompanied by the documents submitted by the grievant(s).

Step 3. If the matter is not satisfactorily settled at the second step, grievant may within 10 work days after the Step 2 decision advance the grievance to the Commandant. The written grievance will be accompanied by the Steps 1 and 2 grievances and decisions together with any additional material which has a bearing on the issue. The Commandant or his designee will meet with the grievant(s) and the Union representative within 10 work days of receipt of the grievance. The written decision will be rendered within 10 work days of the meeting(s), and will be accompanied by documents submitted by the grievant(s).

Arbitration. If the grievance is not satisfactorily settled at the third step, the Union or the Employer may invoke arbitration for final and binding decision.

Section 10. Grievance Officials. For the purposes of this grievance procedure, the following officials are designated to consider employee grievances at the stage/steps indicated:

(1) Informal-chairperson in consultation with the supervisor;

(2) Step 1 - Group Chief

(2) [*sic*] Step 2 - Director of Training

(4) Step 3 - Commandant

B. Other Unit Employees:

(1) Informal - first line supervisor

(2) Step 1 - second line supervisor

(3) Step 2 - Chief of Directorate or major staff office

(4) Step 3 - Commandant

Section 11. Class Grievances. If two or more unit employees requesting representation by the Union have substantially identical grievances and wish to pursue them under Section 9. of this article, the Union may select one employee's grievance for processing and the outcome of that grievance will be binding on the other employee(s) concerned. When the provisions of this Section are to be invoked, the Union will so notify the Employer in writing concurrent with the initiation of the formal grievance. Such written notification will include the names of all grievants together with the name of the employee whose grievance will be pursued through the formal process.

Section 12. Employer Grievances. An Employer grievance over the interpretation or application of this Agreement shall be submitted by the DLIFLC Commandant or his designee to the Union president within 15 work days of the date be [*sic*] became aware of the incident or decision giving rise to the grievance. The Union president will meet with the Commandant or his designee within 10 work days of his receipt of the grievance and attempt to resolve the dispute. The Union president will notify the DLIFLC Commandant of his decision in writing within 10 work days of the meeting.

ARTICLE VII
ARBITRATION

Section 1. General. If the Employer and the Union fail to settle any grievance processed under the Negotiated Grievance Procedure, either Party may within 15 work days after receipt of the third step decision notify the other Party of a request to arbitrate.

Section 2. Selection Procedures. Within 5 work days of the request, the Parties shall jointly submit a request to

the Federal Mediation and Conciliation Service (FMCS) or other mutually agreeable source for a list of at least 7 impartial persons qualified to act as arbitrators. Within 5 working days of receipt of the list of arbitrators the Parties will meet and if unable to agree upon one of the listed arbitrators the Employer and the Union will each strike one arbitrator's name from the list and repeat this procedure until only one name is left, who shall be the duly selected arbitrator. The method for determining who strikes first shall be by coin toss (the official who selects the face up side of the coin shall make the first strike). If for any reason either Party refuses to participate in the selection of an arbitrator and all requirements for arbitration in the Agreement are satisfied, the FMCS shall be empowered to designate an arbitrator to hear the case.

Section 3. Stipulation of Facts. The Parties shall meet and make a good faith attempt to develop a mutually acceptable stipulation of the issue(s). If unable to agree on a stipulation of issue(s), each Party will prepare his/her own and the selected arbitrator shall be empowered to frame the issue, taking into consideration the positions of the Parties and the terms of this Agreement. The Parties will also prepare a stipulation of facts which will be forwarded to the arbitrator prior to the commencement of the hearing. The stipulation of facts will normally include a copy of this Agreement, the written grievance from each step, the written decision from each step, the stipulation(s) of the issue(s), and any other mutually agreeable documents.

Section 4. Scope of Authority. The arbitrator is empowered to rule on the interpretation and application of this Agreement and pertinent laws and regulations of

appropriate authority. When the interpretation of a regulation of higher authority is in dispute, the arbitrator will give due weight to interpretations provided by the Employer prior to an award being rendered. The arbitrator shall have no power to add to or subtract from, disregard or modify any of the terms of this Agreement or regulations and policies of the Employer and the award must be fully consistent with all pertinent laws, executive orders and regulations of higher authority.

Section 5. Costs. The arbitrator's fee, the expenses of arbitration including stenographic assistance, cost of transcript, cost of arbitrator's travel expenses and per diem shall be shared equally by the Parties. The arbitration hearing will be held in well ventilated facilities made available by the Employer during the regular day shift hours (0745-1645) Monday through Friday insofar as it is practicable. The arbitrator will provide the Parties with an itemized bill which summarizes services rendered.

Section 6. Duty Status. The aggrieved, the union representative, and the aggrieved's witnesses approved by the arbitrator who are in duty status shall be excused from duty to participate in the arbitration hearing without loss of pay or charge to annual leave.

*Section 7. Timeliness.*The arbitrator will be requested by the Parties to render the decision as quickly as possible but in any event no later than 30 calendar days after the conclusion of the hearing unless the Parties agree otherwise.

Section 8. Exceptions. The arbitrator's decision will be binding on the Parties. However, either Party may file exceptions to the arbitrator's award with the Federal Labor Relations Council under regulations prescribed by the council and other appropriate authority.

Section 9. Applicability. The provisions of this article shall not be applicable to removal actions involving probationary employees, intermittent employees or employees serving under time-limited appointments.

ARTICLE XXII
DISCIPLINE

Section 1. General. Formal disciplinary actions include written reprimands, suspensions, demotions, and removals and will be taken only for just cause.

Section 2. Representation.

A. It is agreed that the informal resolution of disciplinary problems is in the best interest of the Employer, the Union and employees. In order to preclude the development of adversary proceedings which would be detrimental to the desired goal of informal resolution of potential disciplinary action, an individual representative will not be permitted at a non-formal meeting between an employee and the supervisor. However, nothing herein shall preclude a supervisor from requesting the presence of a Union steward or officer at non-formal meetings if in the judgment of the supervisor, his/her presence may facilitate the resolution of the problem.

B. Supervisors or management officials may conduct preliminary investigations into alleged misconduct prior to proposing disciplinary actions. Meetings between supervisors or management officials and involved employees pursuant to this paragraph are non-formal meetings.

C. For the purposes of this article, a formal meeting shall be defined as a meeting where potential discipline is

to be discussed and two or more management officials are present with the affected employee. In such meetings, employees are entitled to a Union representative if desired.

D. Following notification of proposed disciplinary action, a competitive service employee is entitled to be represented by a person of choice but, an excepted service employee may be represented only by the Union or someone approved by the Union. Such representation is authorized in order to permit the employee the maximum opportunity to respond to the charges in a complete and effective manner. If a grievance is filed under the terms of this Agreement over the propriety of formal disciplinary action, the employee may only be represented by themselves, the Union, or someone approved by the Union.

E. The Employer agrees that in all formal disciplinary actions the employee will be furnished with an extra copy of the notice of proposed disciplinary action and the notice of decision which may be given to the employee's representative. The copies will be annotated "representative's copy".

Section 4. Probationary Employees. It is recognized that the one year probationary/trial period through which all new DLIFLC employees must pass, is an extension of the initial examining process wherein the employee's suitability for continued employement [*sic*] is subjected to careful scrutiny by management. Accordingly, probationary/trial period employees are not entitled to the same job protection rights flowing to non-probationary, permanent employees. Specifically, grievances filed by or on behalf of probationary/trial period employees which contest the propriety of removals will not be subject to the arbitration process.

Section 5. Temporary Employees. It is recognized that employees serving on temporary appointments with definite time limitations or intermittent appointments, are employed solely for the purpose of meeting a temporary or intermittent need and are not entitled to the full job protection rights afforded to permanent employees. Specifically, grievances filed by or on behalf of temporary or intermittent employees which contest the propriety of removals, will not be subject to the arbitration process.

Section 6. Grievances. Grievances contesting the propriety of formal disciplinary action may be filed by the affected employee not sooner than the employee's receipt of the notice of decision but not later than 5 working days after the effective date of the action or return to duty from suspension. The grievance will normally be initiated at Step 2 of the grievance procedure unless there are no officials organizationally situated between the Commandant and the official that signed the notice of decision. In that case, the grievance will be initiated at Step 3.

Section 7. Excepted Service Procedural Requirements. When formal disciplinary action is sought against "permanent" non-trial period excepted service employees, they are entitled to:

A. an advance written notice stating the reasons, specifically and in detail, for the proposed action;

B. a reasonable time for answering the notice of proposed a ion personally and in writing and for furnishing affadavits [*sic*] in support of the answer;

C. a written notice of decision at the earliest practicable date which informs the employee of the reasons for the action together with pertinent grievance and appeal rights; and

D. reasonable access to documents and evidences that were used in support of the discipline.

Section 8. Competitive Service Procedural Requirements. When formal disciplinary action is sought against "permanent", non-probationary, competitive service employees, procedural requirements of FPM Chapter 752 will be followed.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
200 Constitution Avenue, NW.
Washington, DC 20216

OFFICE OF THE GENERAL COUNSEL

JUN 17 1980

Richard DeStefano
Duffy and DeStefano
Attorneys At Law
335 El Dorado, Suite 7
Monterey, California 93940

Re: Defense Language Institute
Foreign Language Center
Presidio of Monterey, California
Case No. 9-CA-53
and
National Federation of Federal
Employees, Local 1263
Case No. 9-CO-5

Dear Mr. DeStefano:

Your appeals of the Regional Director's refusal to issue complaints in the above-named cases, in which it was alleged that the Charged Parties violated section 7116(a)(1) and (2), and sections 7116(b)(8) and 7114(a) (1), respectively, of the Federal Service Labor-Management Relations Statute, have been considered carefully.

In agreement with the Regional Director, it was concluded that further proceedings in Case No. 9-CA-53 are unwarranted. In this regard, the evidence does not establish that the Charged Party (the Defense Language Institute) had an obligation to invoke arbitration in behalf of the Charging Party, an individual, because of an alleged conflict of interest on the part of the exclusive representative. Moreover, the evidence is insufficient to establish that the Charged Party's conduct in this case was otherwise violative of the Statute.

EXHIBIT 16

Contrary to the Regional Director, it was concluded in Case No. 9-CO-5 that the Charged Party (National Federation of Federal Employees, Local 1263) violated its duty to fairly represent all members of the bargaining unit equally in its consideration of whether to invoke arbitration in behalf of the individual Charging Party. In this regard, the evidence establishes that the Charged Party based its refusal to invoke arbitration on considerations unrelated to the merits of the Charging Party's grievance. Under these circumstances, the Charged Party's conduct was viewed as inconsistent with its representational responsibilities and thus violative of the Statute.

Accordingly, your appeal in Case No. 9-CA-53 is denied and your appeal in Case No. 9-CO-5 is granted. Case No. 9-CO-5 is remanded to the Regional Director, who is hereby directed to issue a complaint in this matter, absent settlement.

For the General Counsel.

Sincerely,
/s/ RICHARD A. SCHWARZ
Richard A. Schwarz
Assistant General Counsel for Appeals

cc: Regional Director, Region 9

Martin Frantz, Labor Relations Officer, Defense Language Institute, Presidio of Monterey, California 93940

Rogelio A. Castro, President, National Federation of Federal Employees, Local 1263, P.O. Box 5836, Monterey, California 93940

FEDERAL LABOR RELATIONS AUTHORITY

NATIONAL FEDERATION OF FEDERAL EMPLOYEES LOCAL 12633 MONTEREY, CALIFORNIA -Charged Party -AND- EFTHIMIOS A. KARAHALIOS -Charging Party	CASE NO. 9-CO-5

SETTLEMENT AGREEMENT
(LABOR ORGANIZATION RESPONDENT)

The undersigned Labor Organization and the undersigned Charging Party in settlement of the above matter, and subject to the approval of the Regional Director on behalf of the Federal Labor Relations Authority, HEREBY AGREE AS FOLLOWS:

WITHDRAWAL OF CHARGE-Upon approval of this Agreement by the Regional Director the Charging Party requests withdrawal of the Charge in the above-named case.

POSTING OF NOTICE-The Labor Organization will post copies of the Notice To All Members, attached hereto and made a part hereof, in conspicuous places in and about its office(s), including all places where notices to members are customarily posted for a period of at least sixty (60) consecutive days from the date of posting. The Labor Organization will submit signed copies of said Notice to the Regional Director who will forward them to the Agency whose employees are involved herein, for posting in conspicuous places in and about the Agency's premises where they shall be maintained for a period of at least sixty (60) consecutive days from the date of posting.

EXHIBIT 17

OTHER ACTION TO BE TAKEN-

NONE

COMPLIANCE WITH NOTICE-The Labor Organization will comply with all the terms and provisions of said Notice.

REFUSAL TO ISSUE COMPLAINT-In the event the Charging Party fails or refuses to become a party to this Agreement, then, if the Regional Director in his discretion believes it will effectuate the policies of Chapter 71 of Title 5 of the U.S.C., he shall decline to issue a Complaint herein and this Agreement shall be between the Labor Organization and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 2423.10(b) of the Regulations of the Federal Labor Relations Authority if a request for review is filed within ten (10) days thereof. This agreement is contingent upon the General Counsel sustaining the Regional Director's action in the event of review. Approval of this Agreement by the Regional Director shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in this case.

PERFORMANCE-Performance by the Labor Organization of the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director or, in the event the Complainant does not enter into this Agreement, performance shall commence immediately upon receipt by the Labor Organization of advice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE-The undersigned (party) (parties) to this Agreement will notify the Regional

Director in writing what steps the Labor Organization has taken to comply herewith. Such notification shall be made within five (5) days, and again after sixty (60) days, from the date of the approval of this Agreement, or, in the event the Charging Party does not enter into this Agreement, after the receipt of advice that no review has been requested or that the General Counsel has sustained the Regional Director.

COMPLIANCE WITH SETTLEMENT AGREEMENT-Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in the above case.

National Federation of Federal Employees, Local 12633	Efthimios A. Karahalios
(Labor Organization)	(Charging Party)
By: _____ _____ (Type or Print Name and Title) (Date)	By: _____ _____ (Type or Print Name and Title) (Date)
_____ (Signature)	_____ (Signature)
	Approved: _____ (Date)
	By: _____ Regional Director

FLRA Form 57
(1-79)

NOTICE TO ALL MEMBERS

PURSUANT TO

A SETTLEMENT AGREEMENT APPROVED BY THE
REGIONAL DIRECTOR ON BEHALF OF THE

FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR MEMBERS THAT:

WE WILL NOT inform employees that where two or more employees are seeking one position, the Union, the National Federation of Federal Employees, Local 1263, cannot represent all such employees in the contractual grievance procedure.

WE WILL NOT inform employees that it would be a conflict of interest for the Union, the National Federation of Federal Employees, Local 1263, to represent all such employees.

WE WILL NOT in any like or related manner interfere with, restrain or coerce any employees in the exercise of their rights under the Statute.

National Federation of Federal Employees, Local 1263
(Labor Organization)

Dated _____ By _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority whose address is: FEDERAL LABOR RELATIONS AUTHORITY, Room 11408, P.O. Box 36016, 450 Golden Gate Avenue, San Francisco, California 94102.

Case No. 9-CO-5

FLRA Form 54
(1-79)

(Karahalios I)

Efthimios A. KARAHALIOS, Plaintiff,

v.

DEFENSE LANGUAGE INSTITUTE FOREIGN LANGUAGE CENTER PRESIDIO OF MONTEREY, and Local 1263, National Federation of Federal Employees, Defendants.

No. C-81-2745 RFP.

United States District Court,
N. D. California

March 9, 1982.

Thomas R. Duffy, Monterey, Cal., for plaintiff.

Deborah Seymour, Asst. U. S. Atty., San Francisco, Cal., Paul Blankenstein and Mark Chavez, Dept. of Justice, Washington, D.C., for defendants.

ORDER

PECKHAM, Chief Judge.

Efthimios Karahalios is employed by the Defense Language Institute ("DLI"), a federal agency, as an instructor of Greek. He has filed suit against DLI and Local 1263, National Federation of Federal Employees ("the union"), the exclusive representative of DLI employees. The events giving rise to the suit are as follows.

In early 1977, plaintiff was promoted from instructor (pay grade GS-9) to course developer (pay grade GS-11) through a competitive selection process. Shortly thereafter, Simon Kuntelos, another Greek instructor at DLI, filed a grievance.[1] He had been a course developer from 1963 until 1971, at which point his rank had been reduced to instructor as a result of the elimination of the course developer position. When the position became available again and was given to plaintiff, Kuntelos filed the grievance mentioned above. He was denied relief by DLI. The union then demanded that his grievance be arbitrated. The arbitrators decided that the competitive selection process which had been used to select plaintiff was erroneous. The position was reopened.

Throughout Kuntelos' grievance and arbitration, neither the union nor DLI notified plaintiff of the controversy. He was finally informed of the arbitrators' decision on February 21, 1978, and was told he could respond in writing. Kuntelos was ultimately awarded the position of course developer on April 6, 1978. Plaintiff's grade was reduced to GS-9.

Plaintiff filed grievances with DLI in May and October of 1978. They were denied on December 20, 1978. Plaintiff then requested that the union invoke arbitration. It refused, on the grounds that advocacy of plaintiff's position would conflict with the union's previous advocacy of Kuntelos's position, and with the binding decision the arbitrators had made concerning Kuntelos' grievance. On January 17, 1979, plaintiff himself attempted to invoke arbitration. The union and DLI both refused to arbitrate.

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[1] Unlike plaintiff, Kuntelos is a member of the union and of the union's board of directors.

On May 16, 1979, plaintiff filed unfair labor practice charges against the union and DLI, with the Federal Labor Relations Authority ("FLRA"). The Regional Director of the FLRA decided not to file complaints against either the union or DLI. Plaintiff requested that the General Counsel of the FLRA review this decision. The General Counsel affirmed the Regional Director's decision with respect to the charge against DLI, but reversed as to the union, finding that, by deciding not to invoke arbitration on plaintiff's behalf, the union had violated its duty to represent all members of the bargaining unit equally. The General Counsel directed the Regional Director to issue a complaint against the union, absent settlement. The union and the Regional Director reached a settlement agreement whereby the union would notify its members that, in future, it would not inform employees that it could not represent more than one employee seeking the same position. The settlement agreement afforded no relief to plaintiff as an individual. Plaintiff requested that the General Counsel review the settlement as to the union, and reconsider the decision not to issue a complaint against the DLI. Both requests were denied.

Plaintiff then filed this action. In his First Amended Complaint, he alleges that the union breached its duty of fair representation, and that DLI breached the collective bargaining agreement. In addition, he asserts two constitutional claims against DLI. Both defendants filed motions to dismiss the claims relating to the labor disputes, arguing that this court lacks subject matter jurisdiction over them.[2] In addition, DLI moved to dismiss the constitutional claims.

[2] The union requests summary judgment, in the alternative.

I. *Subject Matter Jurisdiction Over Unfair Representation and Breach of Collective Bargaining Agreement Claims*

A. Applicable Body of Law

Prior to January 11, 1979, labor-management relations in the federal service were governed by Executive Order 11491, as amended. 5 U.S.C.A. § 7101, note. That order authorized federal employees to form labor organizations. It also set up an administrative scheme for enforcing the provisions of the order. It did not provide a role for the federal judiciary in this scheme. Defendants argue that the order is controlling, and that, as a result, this court has no jurisdiction over any of plaintiff's claims concerning labor-management relations in the federal sector.

Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7101 *et seq.* ("the Act") revised the administrative procedures set forth in Executive Order 11491, and provided opportunities for limited judicial review not previously available. Thus, the first question we must address is which body of law applies to the instant case—the Executive Order, or the Act.

The Act became effective on January 11, 1979. A savings clause makes the Act inapplicable to cases instituted before its effective date:

> No provision of this Act . . . shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

5 U.S.C.A. § 1101, note (Supp.1981). Under the savings clause, the question is whether any administrative pro-

ceedings were pending in the present case on January 11, 1979. If such proceedings were pending, the Executive Order applies. If there were no proceedings pending on January 11, 1979, the Act applies.

The most recent version of the federal regulations issued during the transition from the Executive Order to the Act indicates that in order for an administrative proceeding to have been "pending" as of January 11, 1979, such that the old Executive Order should apply, the proceeding must have been filed with the FLRA by that date. It is not enough for the events triggering the administrative proceeding to have occurred prior to January 11, 1979:

> § 2400.2 Processing of unfair labor practice, representation, grievability/arbitrability and national consultation rights cases.
>
> All unfair labor practice, representation, grievability/arbitrability and national consultation rights cases pending before the Assistant Secretary and the Vice Chairman on December 31, 1978 (including cases the time limit for which an appeal to the Council has not expired under the Council's rules and regulations), all such cases pending before the Council on December 31, 1978, and all such cases filed with the Authority during the period January 1 through January 10, 1979, shall be processed by the Authority in accordance with the Rules and Regulations [promulgated under the Executive Order].

5 C.F.R. 845 § 2400.2 (1981). *Compare* earlier version at 5 C.F.R. 642 § 2400.2 (1979). It is true, as defendants state, that the transitional regulations are for the internal use of the FLRA and are not binding on the courts. But they are not inconsistent with the savings clause, which *is* binding upon the courts.

If analyzed under the transitional regulations of the FLRA, the present case would be governed with the new Act, for, although the events which gave rise to this action all occurred prior to January 11, 1979, Karahalios filed his unfair labor practice charges with the FLRA on May 16, 1979, well after the effective date of the new Act. The language of the savings clause, as well as the FLRA's transitional regulations, indicate that the present lawsuit should be governed by the new Act, rather than by the old Executive Order. We so hold.[3]

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[3] The Merit System Protection Board ("MSPB") has construed the savings clause in a different fashion:

> "Pending" is considered to encompass existing agency proceedings, and appeals before the Board or its predecessor agencies, that were subject to judicial review or under judicial review on January 11, 1979, the date on which the Act became effective. *An agency proceeding is considered to exist once the employee has received notice of the proposed action.*

44 Fed. Reg. 38349, 38360-61 (1979) (emphasis added). Under that interpretation, the present action would be governed by the Executive Order, since Karahalios received notice of the reduction in pay grade on February 21, 1978, and an agency proceeding thus "existed" on that date.

The MSPB interpretation of the savings clause—that an agency proceeding exists if the contested personnel action occurred prior to January 11, 1979—has apparently been followed only in appeals from MSPB decisons. *See, e.g., Ellis v. Merit Systems Protection Board*, 613 F.2d 49 (3d Cir.1980); *Kyle v. Interstate Commerce Commission*, 609 F.2d 540 (D.C.Cir.1980); *Motley v. Secretary of the United States Department of the Army*, 608 F.2d 122 (5th Cir.1979). The courts have been inclined to "[respect] the Board's interpretation of the savings clause . . . in accordance with the judicial deference usually accorded to the interpretation made by the agency charged with a statute's administration." *Kyle v. Interstate Commerce Commission, supra*, 609 F.2d at 542. The rationale for the interpretation given the savings clause in MSPB appeals appears to turn upon the statute of limitations for judicial review of actions brought before the MSPB. Under the new Act, a peti-

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B. *Subject Matter Jurisdiction Under the Civil Service Reform Act of 1978*

Defendants contend that, even if the present action is governed by the new Act, as we have held, the federal district courts lack subject matter jurisdiction over actions such as the present one. The new Act does provide a role for the federal judiciary, but, as defendants point out, that role is narrowly circumscribed.[4] In contrast, Congress has entrusted a broad range of functions to the FLRA, the specialized agency which administers and enforces the provisions of the Act.[5]

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tion for appellate review of a decision by the MSPB must be filed within 30 days of the Board's final order—a significantly shorter filing period than the six years afforded under prior law. The courts were concerned that any case even arguably covered by the prior law should be afforded the more liberal statute of limitations period, given that individuals who had experienced adverse personnel actions prior to January 11, 1979 may have been relying upon the six year time for filing. Thus, the courts adopted the MSPB's expansive view as to when the prior law should control. *Id.* No such difficulties concerning the statute of limitations exist in cases of the present nature. The instant case is not an appeal from an administrative agency, arguably controlled by conflicting statutes of limitations. Consequently, in the context of an action for breach of the duty of fair representation and breach of a collective bargaining agreement, we are disinclined to follow the somewhat tortuous reading of the savings clause given in appeals from MSPB decisions.

[4] The Act explicitly empowers the federal courts to act in only three instances. (The National Labor Relations Act ("NLRA") contains parallel provisions empowering the federal courts to act in the context of private sector labor management relations.) First, the Act makes judicial review of final orders of the FLRA available to any aggrieved party, in the court of appeals. 5 U.S.C. § 7123(a). (*Cf.* 29 U.S.C. § 160(f).) Second, it provides that the FLRA may itself petition the court of appeals for the enforcement of any FLRA order and for appropriate temporary relief or restraining orders. 5 U.S.C. § 7123(b). (*Cf.* 29 U.S.C. § 160(e).) Third, the FLRA, upon issuing an unfair labor practice complaint, may petition a federal district court for temporary injunctive relief. 5 U.S.C. § 7123(d). (*Cf.* 29 U.S.C. § 160(j).)

[5] The FLRA is responsible for providing leadership in establishing policies and guidance relating to matters covered by the Act, and has

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It is defendants' contention that plaintiff is simply alleging that defendants have committed unfair labor practices under 5 U.S.C. § 7116, and that plaintiff's claims are therefore under the exclusive jurisdiction of the FLRA, just as most conduct arguably protected by the NLRA or arguably prohibited by its unfair labor practices provisions is under the exclusive jurisdiction of the *National Labor Relations Board. Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). Thus, they say, plaintiff cannot bring an action for breach of the duty of fair representation and breach of the collective bargaining agreement in federal district court. His only recourse is to pursue his administrative remedies (which he has done), and then appeal to the Ninth Circuit from a final order of the FLRA.

This is evidently a case of the first impression on this question. The jurisdiction of the federal courts under the Act has so far been decided only in contexts in which the plaintiff has requested injunctive relief. *See, e.g., United States v. Professional Air Traffic Controllers Organization (PATCO)*, 653 F.2d 1134 (7th Cir.1981), *cert. denied*, _____ U.S. _____, 102 S.Ct. 639, 70 L.Ed.2d 617 (1981) (district court did have jurisdiction to enjoin

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responsibility for carrying out the purposes of the Act. 5 U.S.C. § 7105(a)(1). The FLRA is also the body which handles unfair labor practice charges "in a manner essentially identical to National Labor Relations Board practices in the private sector." S.Rep.No. 969, 95th Cong., 2d Sess. 106 (1978). The procedures for handling unfair labor practice charges are outlined at 5 U.S.C. § 7118, as are the FLRA's remedial powers, which include the issuance of cease and desist orders and of orders requiring reinstatement and back pay. 5 U.S.C. § 7118(a)(7).

strike); *National Federation of Federal Employees, Local 1263 v. Defense Language Institute*, 493 F.Supp. 675 (N.D.Cal.1980) (district court lacked jurisdiction to grant plaintiff union an injunction requiring defendants to bargain over the impact of a proposed reduction in force); *Clark v. Mark*, Case No. 79-CV-777 (N.D.N.Y.1980) (district court lacked jurisdiction to grant union injunctive relief requiring employer to enforce the terms of a collective bargaining agreement). We have located no cases which consider whether an action for *damages* of the present sort can be maintained in federal court.

The damages action consists of two components: the suit against the union and the suit against the employer. They are analyzed separately below.

1. *Alleged breach of duty of fair representation by the union.* As the parties have suggested, the key analogy here is the manner in which labor relations are handled in the private sector. The duty of fair representation owed by a union to the members of its bargaining unit has been found in both the NLRA, *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953), and the Railway Labor Act ("RLA"), *Tunstall v. Brotherhood of Locomotive Firemen and Engineermen*, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944); *Steele v. Louisville & Nashville Railway Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944),—not in any express provision, but implicit in the statutes themselves. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, n.8, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 66-7 n.2, 101 S.Ct. 1559, 1565-1566 n.2, 67 L.Ed.2d 732 (1981) (Stewart, J., concurring). The cause of action against a union for breach of the duty of fair representation, then, arises under federal law; and the district courts have federal question jurisdiction over such a claim. Similarly, in the Civil Service Reform Act of 1978, there is an implied duty of fair representation owed by a union to all members of the bargaining unit, despite the fact that there is no explicit provision establishing such a duty. Moreover, just as the implicit duty of fair representation gives rise to a cause of action under the NLRA and the RLA despite the otherwise narrowly limited role of the courts under those statutes, the implied duty of fair representation in the Civil Service Reform Act should be enforceable in the district court under 28 U.S.C. § 1331.

This is especially true since one of the primary rationales for allowing such actions under the NLRA and the RLA is equally applicable to actions such as the present one. The rationale is that the administrative boards set up under the various labor acts are more concerned with broad questions of policy than with individuals, so that if individuals are not allowed to enforce the duty of fair representation in court, they may gain no practical benefit from the labor laws. *See Vaca v. Sipes*, *supra*, 386 U.S. at 182-83, 87 S.Ct. at 912-913.

The subordination of the individual's interests to the interest of the group by the administrative board is precisely what has occurred in plaintiff's case. The FLRA settled his unfair practices charge against the union instead of issuing a complaint; and the settlement granted no relief to plaintiff in connection with what FLRA did conclude was an unfair labor practice by the union. The board was concerned only with preventing *future* abuses by the union. Plaintiff, then, lacks an adequate administrative remedy as did the petitioner in *Vaca*

v. Sipes. He should be allowed to seek relief against the union in this court for the same reason that aggrieved employees in the private sector are allowed to sue their unions in federal court for breaches of the duty of fair representation. Accordingly, we hold that there is implicit in the Civil Service Reform Act a duty of fair representation owed by a union to the members of the bargaining unit, and that we have federal question jurisdiction over actions arising from breaches of this duty. Defendants' motion to dismiss the First Cause of Action is therefore denied. Defendant union's alternative motion for summary judgment is likewise denied.

2. *Alleged breach of the collective bargaining agreement by DLI.* Under the NLRA and the RLA, dual-pronged actions are allowed, in which an aggrieved employee sues the union for breach of the duty of fair representation and the employer for breach of the collective bargaining agreement. We have discussed the first prong of such actions above and will now discuss the second.

In NLRA suits, the second prong of the suit has a statutory basis in section 301 of the Act. *Vaca v. Sipes*, *supra*, 386 U.S. at 183-84, 87 S.Ct. at 913-914. There is no parallel provision in the Civil Service Reform Act which would explicitly empower federal courts to hear actions alleging breaches of collective bargaining agreements by federal agencies. Defendants maintain that this lack of specific statutory authority precludes this court from hearing the present action. However, two-pronged actions can also be maintained against unions and employers subject to the RLA, *Glover v. St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 89 S.Ct. 548, 21 L.Ed.2d 519 (1969); *Conley v. Gibson*, 355 U.S. 41, 78

S.Ct. 99, 2 L.Ed.2d 80 (1957); *Bagnall v. Air Line Pilots Association, Int'l*, 626 F.2d 336 (4th Cir. 1980), *cert. denied*, 449 U.S. 1125, 101 S.Ct. 943, 67 L.Ed.2d 112 (1981), despite the fact that the RLA does not contain a provision similar to section 301 of the NLRA. This suggests that the question whether an employee can sue an employer for breach of a collective bargaining agreement negotiated pursuant to the Act does not turn on the existence *vel non* of an explicit statutory provision within the Act, authorizing such an action.

The suit for breach of a collective bargaining agreement brought against an employer subject to the NLRA or the RLA is essentially a common law action for breach of contract. *See Vaca v. Sipes*, *supra*; *Rumbaugh v. Winifrede Railroad Co.*, 331 F.2d 530 (4th Cir. 1964), *cert. denied*, 379 U.S. 929, 85 S.Ct. 322, 13 L.Ed.2d 341 (1964). Thus, we consider whether plaintiff might restate his cause of action as one for ordinary breach of contract against DLI, a federal agency, and so establish federal jurisdiction under 28 U.S.C. § 1346. DLI would argue that since, in general, employees of the federal government hold their positions by appointment rather than by contract, *see, e.g., United States v. Hopkins*, 427 U.S. 123, 96 S.Ct. 2508, 49 L.Ed.2d 361 (1976), no federal emplpyee has a cause of action against a federal employer for breach of a collective bargaining agreement.

While it is true that, traditionally, employment relations in the public sector have not been defined by contract, Congress, through the Civil Service Reform Act, has indicated that the federal government may now enter into collective bargaining agreements with unions which represent federal employees. The effect that this devel-

opment will have upon the manner in which federal employees hold their employment is still uncertain, and is likely to become known only slowly, as the new Act is interpreted, and as the relationships between the new Act and the NLRA and RLA are explored. However, it is clear, at the very least, that a collective bargaining agreement under the Act is an agreement between a federal agency and a union similar to the agreements between private employers and unions under the NLRA and the RLA.

When a union representing private sector employees breaches its duty of fair representation, "individual union members may sue their employers . . . for breach of a promise embedded in the collective-bargaining agreement that was intended to confer a benefit upon the individual." *Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 298-99, 91 S.Ct. 1909, 1923-1924, 29 L.Ed.2d 473 (1971). The determination as to whether the parties intended to confer such a benefit upon the individual is to be made by reading the collective bargaining agreement in light of "the common law of a particular industry or of a particular plant," *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579, 80 S.Ct. 1347, 1351, 4 L.Ed.2d 1409 (1960). Our task, then, narrowly defined, is to determine whether Congress could have intended collective bargaining agreements between federal agencies and unions to confer benefits upon federal employees in the same way that collective bargaining agreements in the private sector confer benefits upon the employees of private employers.

We do not suggest that the relationship between a federal employer and its employees becomes a "contractual"

one in all respects by virtue of the negotiation of a collective bargaining agreement. Federal employers have traditionally had wide discretion in matters of employment relations for reasons of public policy. This discretion has been manifest in the freedom of the federal employer from contractual restraints upon relations with employees. However, it would be incongruous to suggest that Congress intended the Civil Service Reform Act to have no effect on the traditional structure of labor relations in the federal sector. When a federal agency becomes a party to a collective bargaining agreement, it, no less than its counterpart in the private sector, helps to create a code defining the rights and duties of the parties. Insofar as the collective bargaining agreement elicits from the federal agency promises which are "intended to confer a benefit upon the individual," *Amalgamated Ass'n etc. v. Lockridge, supra*, 403 U.S. at 299, 91 S.Ct. at 1924, those promises should be binding upon the federal agency just as they would be on a private employer.

When the courts are called upon to determine whether a benefit has been conferred upon a federal employee by a collective bargaining agreement, any ambiguity in the agreement is likely to be construed in light of the preference for granting federal agencies wide discretion in matters of employment. This preference for discretion must necessarily form a part of the "common law" of the federal agency. But, given this limitation upon the benefits likely to be conferred upon federal employees, we are unwilling to state that a collective bargaining agreement between a federal employer and a union can never confer a benefit upon an individual employee.

That being said, however, we find that the action by this plaintiff against his employer cannot be maintained. If it is to be entertained by this court, it must be brought

under 28 U.S.C. § 1346, subject to the limitations of that statute. Plaintiff has only alleged federal question jurisdiction, which is inapplicable to actions for breach of contract against the federal government. Accordingly, the Second Cause of Action must be dismissed, with leave to amend, for lack of subject matter jurisdiction.[6]

II. *Constitutional Claims*

As noted above, plaintiff alleges constitutional violations by DLI. Specifically, the Third Cause of Action alleges that, by arbitrating Kuntelos' grievance without affording plaintiff notice and a hearing, DLI deprived plaintiff of property without due process of law, in violation of the fifth and fourtheenth amendments. The Fourth Cause of Action alleges that the collective bargaining agreement, as applied by DLI, violates the equal protection clause of the fourteenth amendment by denying arbitration to employees who cannot be represented at arbitration by their union and by effectively denying collective bargaining representation to such employees.

[6] If plaintiff chooses to amend his complaint, he should indicate the amount of the damages he is requesting, so tht we can determine whether this case falls within the jurisdictional amount requirement inposed upon us by 28 U.S.C. § 1246. If the action is for an amount greater than $10,000, we lack jurisdiction over it. The Court of Claims would, however, have jurisdiction. The fact that plaintiff would not be able to proceed against the union in the Court of Claims should not preclude the Court of Claims from hearing the breach of contract claim against the federal agency. *Cf. Clayton v. ITT Gilfillan*, 623 F.2d 563 (9th Cir.1980), *aff'd in part, rev'd in part sub nom Clayton v. International Union, United Automobile, etc.*, 451 U.S. 679, 101 S.Ct. 2088, 68 L.Ed.2d 538 (1981); *Smart v. Ellis Trucking Co., Inc.*, 580 F.2d 215 (6th Cir.1978), *cert. denied*, 440 U.S. 958, 99 S.Ct. 1497, 59 L.Ed.2d 770 (1979). Of course, in order to prevail in such an action before the Court of Claims, plaintiff would still need to prove that the nonparty union breached its duty of fair representation, as a predicate to establishing DLI's alleged liability for breach of the collective bargaining agreement.

The two fourteenth amendment claims must be dismissed. The fourteenth amendment only covers *state* action, and has no applicability in an action, like the present one, against a *federal* entity. Thus, of the constitutional claims, there remains for consideration only the action brought under the fifth amendment due process clause.

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the . . . protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). Plaintiff alleges that he had a property interest in the course developer position which entitled him to certain procedural guarantees. In order to establish such a property interest, plaintiff must establish that he had a "legitimate claim of entitlement" to the position, and not merely an "abstract need or desire" for the position, or a "unilateral expectation" of it. *Board of Regents v. Roth, supra*, 408 U.S. at 577, 92 S.Ct. at 577. *See also Perry v. Sindermann*, 408 U.S. 593, 602-03, 92 S.Ct. 2694, 2700, 33 L.Ed.2d 570 (1972). Plaintiff alleges that his property right arises from the fact that he could be removed from the course developer position only for just cause.

Federal employees can be removed only for cause if they are either in the "competitive service," or are in the "excepted" (noncompetitive) service but are "preference eligible"—i.e., Veterans. 5 U.S.C. § 7511(a)(1)(A)-(B); § 7513. Plaintiff was not covered by either of these provisions. Pursuant to 5 C.F.R. 213.3107(a), the positions of course developer and language instructor are excepted from the competitive service. As a non-Veteran in the excepted service, plaintiff was not entitled to procedural

guarantees under the statute. *Cf. Paige v. Harris*, 584 F.2d 178, 181 (7th Cir.1978). Thus, in order to show that he was entitled to such guarantees, he must prove that the guarantees were established by, or otherwise binding upon, his employing agency. *Board of Regents v. Roth*, *supra*; *Colm v. Vance*, 567 F.2d 1125, 1127-28 (D.C.Cir. 1977).

Plaintiff contends that the collective bargaining agreement, which is binding upon DLI, provides that he cannot be dismissed without just cause. If that were true, it would give rise to a property right. However, it appears that plaintiff has misconstrued the collective bargaining agreement. The agreement provides that "*[f]ormal disciplinary actions* include written reprimands, suspensions, demotions, and removals, and *will be taken only for just cause.*" Article XVI, § 2B of the May 5, 1976 collective bargaining agreement (emphasis added). See also Article XXII of the May 15, 1978 collective bargaining agreement. The reduction of plaintiff's grade from GS-11 to GS-9 was not a disciplinary action. Thus, the reduction in grade was not governed by the "just cause" provision of the collective bargaining agreement, which, by its terms, is applicable only to disciplinary actions. Instead, it appears to be governed by 5 U.S.C. § 7106(a)(2)(A), which, in relevant part, indicates that ". . . nothing in this chapter shall affect the authority of any management official of any agency . . . (2) in accordance with applicable laws—(A) to hire, assign, direct, layoff and retain employees in the agency . . ."

Plaintiff correctly asserts that, even if the explicit language of the applicable rules, regulations, and collective bargaining agreement provisions do not create a constitutionally protected property interest, a property interest

may arise from "understandings, promulgated or fostered by . . . officials, that may justify . . . [a] legitimate claim of entitlement to continued employment absent 'sufficient cause.'" *Perry v. Sindermann*, *supra*, 408 U.S. at 602-03, 92 S.Ct. at 2700. He has alleged that such understandings exist. His complaint is thus adequate to withstand DLI's motion to dismiss.[7]

However, we are in agreement with DLI's contention that the sovereign immunity doctrine bars plaintiff's recovery of damages other than lost wages for the alleged violation of due process.[8]

> It long has been established, of course, that the United States, as sovereign, "is immune from suit

[7] We would note, however, that in order to prevail in later stages of this action, plaintiff would have to present some concrete basis for his understanding that he could not be demoted without just cause in the present, nondisciplinary context. "[A] legitimate claim of entitlement must derive from some reasonably identifiable source apart from the mere expectancy or desire of the claimant." *Colm v. Vance*, *supra*, 567 F.2d at 1129. *See also Perry v. Sindermann*, *supra*; *Sims v. Fox*, 505 F.2d 857, 861-62 (5th Cir.1974), *cert. denied*, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 678 (1975). Moreover, although "[a]n entitlement may spring from an understanding, . . . the understanding must be 'mutually explicit.'" *Bollow v. Federal Reserve Bank*, 650 F.2d 1093, 1099 (9th Cir.1981), quoting *Board of Regents v. Roth*, *supra*, 408 U.S. at 577, 92 S.Ct. at 2709.

[8] Our decision to this effect is not inconsistent with *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). There, the Supreme Court held that the doctrine of sovereign immunity does not bar an action for damages against federal officials in their individual capacity for violation of the constitutional right to due process under the fifth amendment. It did not hold that sovereign immunity is waived where relief will come from the sovereign itself, as in the present action. *See Beller v. Middendorf*, 632 F.2d 788, 798 n.5 (9th Cir.1980), *cert. denied sub nom Beller v. Lehman*, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1981) and *Miller v. Weinberger*, ____ U.S. ____, 102 S.Ct. 304, 70 L.Ed.2d 150 (1981).

> save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. [584], at 586, 61 S.Ct. 767, 85 L.Ed. 1058. And it has been said, in a Court of Claims context, that a waiver of the traditional sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. [1] at 4 [89 S.Ct. 1501, 23 L.Ed.2d 52].

United States v. Testan, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976). Plaintiff has suggested no meritorious theory upon which we can hold that the United States has agreed to pay all damages resulting from constitutional torts of this nature.

First, he contends that the United States waived sovereign immunity through the passage of the Civil Service Reform Act, which subjects the federal government to damages liability. However, as plaintiff's cause of action for due process violations was brought under the constitution and not under the Civil Service Reform Act, it is immaterial for purposes of the present discussion whether sovereign immunity has been waived as to actions brought under the Act. The question is whether sovereign immunity has been waived as to constitutional torts such as the one alleged by plaintiff.

Plaintiff next contends that sovereign immunity has been generally waived by the Tucker Act, 28 U.S.C. § 1346, which grants the district courts and the Court of Claims jurisdiction over claims against the United States based upon violation of the United States Constitution, statutes, or regulations. Since plaintiff is alleging a constitutional violation, he maintains that damages may be awarded under the Tucker Act. However, the Tucker Act

is the statute which the Supreme Court was discussing in *Testan* when it held that a statute which is purely jurisdictional does not waive sovereign immunity. Such a statute only ensures the litigant that a claim of the variety enumerated may be pursued in the appropriate federal forum. A different statute must be looked to for the substantive right to collect money damages. There is no such statute generally waiving sovereign immunity as to money damages arising from a fifth amendment due process violation. *Cf. Conservative Caucus, Inc. v. United States*, 650 F.2d 1206, 1211-12 (Ct.Cl.1981); *Alabama Hospital Ass'n v. United States*, 656 F.2d 606 (Ct.Cl.1981); *Carruth v. United States*, 627 F.2d 1068 (Ct.Cl.1980); *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007-09 (Ct.Cl.1967).

Third, plaintiff contends that the Back Pay Act, 5 U.S.C. § 5596, "creates a cause of action for money damages arising from adverse personnel actions taken by the federal government against its employees." Plaintiff's Opposition to Defendants' Motions to Dismiss, at 30. In fact, the Back Pay Act only authorizes "*retroactive recovery of wages* whenever a federal employee has 'undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of' the compensation to which the employee is otherwise entitled." *United States v. Testan*, *supra*, 424 U.S. at 405, 96 S.Ct. at 957 (emphasis added). Thus, plaintiff, if he prevails against DLI on his constitutional claim, may recover only back pay, and not general compensatory damages of the variety which he has requested in connection with his Third Cause of Action. Accordingly, DLI's motion respecting the question of damages is granted to the extent just indicated.

In summary, we have denied defendants' motion to dismiss plaintiff's claim against the union for breach of the duty of fair representation. We have federal question jurisdiction over that claim. We have granted, with leave to amend, defendants' motion to dismiss plaintiff's claim against DLI for breach of the collective bargaining agreement. We lack federal question jurisdiction over that claim. Plaintiff may, however, file an amended complaint restating the claim as a cause of action for breach of contract against a federal agency under 28 U.S.C. § 1346, subject to the jurisdictional amount requirements of that statute.

As to the constitutional claims, we have dismissed those which were brought under the fourteenth amendment. We have denied DLI's motion to dismiss the fifth amendment due process claim, as plaintiff has sufficiently alleged a property interest arising from understandings promulgated by DLI officials. However, if plaintiff prevails on this claim, he may recover only back pay, as sovereign immunity bars the recovery of general compensatory damages in an action of this nature.

SO ORDERED.

(Karahalios II)

Efthimios A. KARAHALIOS, Plaintiff,

v.

DEFENSE LANGUAGE INSTITUTE FOREIGN LANGUAGE CENTER PRESIDIO OF MONTEREY, and Local 1263, National Federation of Federal Employees, Defendants.

No. C-81-2745 RFP.

United States District Court,
N. D. California

July 23, 1982

Thomas R. Duffy, Monterey, Cal., for plaintiff.

Deborah Seymour, Asst. U.S. Atty., San Francisco, Cal., Paul Blankenstein and Mark Chavez, Dept. of Justice, Washington, D.C., for defendants.

MEMORANDUM AND ORDER

PECKHAM, Chief Judge.

Pendent Jurisdiction

In our order dated March 9, 1982, 534 F.Supp. 1202, we ruled that we have federal question jurisdiction over plaintiff's claim that defendant union breached its duty of fair representation. As to the claim against the Defense

Language Institute ("DLI") for breach of the collective bargaining agreement, however, we indicated that, as it was essentially a claim for breach of contract against the government, it fell within the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491, so that we lacked jurisdiction over it if it were a claim for over $10,000.

Apparently, plaintiff's claim against DLI is for an amount greater than $10,000. Accordingly, we lack jurisdiction over that claim. However, plaintiff now asks that we assume pendent jurisdiction over the claim so that it can be resolved in the same forum as the claim for breach of the duty of fair representation. Although we recognize that it might be more efficient to try both claims in the same forum, we must deny plaintiff's motion. The United States has not consented to be sued in the district court when a contract claim is for more than $10,000 in damages. "This court cannot, by using the judge-made doctrine of pendent jurisdiction, waive the immunity of the United States where Congress, the constitutional guardian of this immunity, has declined to do so." *Sanborn v. United States*, 453 F.Supp. 651, 655 (E.D.Cal.1977). *See also Ware v. United States*, 626 F.2d 1278, 1285-87 (5th Cir.1980); *Lenoir v. Porters Creek Watershed District*, 586 F.2d 1081, 1087-88 (6th Cir.1978).

Plaintiff fears that the damages issues will be unduly fragmented if the two claims are heard in separate forums. In the typical labor damages action brought by a federal employee, plaintiff's fears would be largely unfounded. Because of the manner in which damages are apportioned between the employer and the union in such cases, the employer generally pays the larger share of any damages which are awarded. A union which is found liable for breach of the duty of fair representation rarely

pays more than a *de minimis* amount in damages. *See Vaca v. Sipes*, 386 U.S. 171, 196-98, 87 S.Ct. 903, 919-921, 17 L.Ed.2d 842 (1967); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48-50, 99 S.Ct. 2121, 2125-2126, 60 L.Ed.2d 698 (1979). For that reason, a federal employee might reasonably choose to proceed in the Court of Claims alone, pursuing only the claim against the federal employer, with the thought that bringing a separate action against the union in the district court would not be sufficiently productive to justify the expense of the litigation.[1] Thus, once the format of these lawsuits by federal employees becomes established, the fragmentation to which plaintiff refers is likely to be minimized.

In any event, as noted above, we must deny plaintiff's motion on the ground that we lack jurisdiction over his claim against his employer.

Reconsideration

Through its opposition to plaintiff's motion requesting that this court assume pendent jurisdiction over the breach of collective bargaining agreement claim, the DLI has, in effect, asked us to reconsider our March 9, 1982

[1] Of course, in deciding the question of the federal employer's liability, the Court of Claims would first have to determine whether the non-party union had breached its duty of fair representation. *Cf. Clayton v. ITT Gilfillan*, 623 F.2d 563 (9th Cir.1980), *aff'd in part, rev'd in part sub nom Clayton v. International Union, United Automobile, etc.*, 451 U.S. 679, 101 S.Ct. 2088, 68 L.Ed.2d 538 (1981); *Smart v. Ellis Trucking Co., Inc.*, 580 F.2d 215 (6th Cir.1978), *cert. denied*, 440 U.S. 958, 99 S.Ct. 1497, 59 L.Ed.2d 770 (1979). The Court of Claims would determine this only as a preliminary question. It would not be empowered to require the union to pay damages to the plaintiff, since the union would not be a party to the action. The Court of Claims would, of course, be able to award damages against the federal employer.

ruling that the federal courts have jurisdiction over damages actions brought by federal employees against their unions and their employers. We will construe the DLI's opposition as a formal motion for reconsideration.

In support of its position, the DLI cites *Columbia Power Trades Council v. United States Department of Energy*, 671 F.2d 325 (9th Cir.1982), an opinion which was issued a few days after our March 9 order. There, the plaintiff union sued for declaratory and injunctive relief, seeking a writ of mandamus directing the Bonneville Power Administration to implement an arbitrator's award of a wage increase. The Ninth Circuit held that the district court was without jurisdiction to hear the case since, by the terms of Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7101 *et seq.* ("the Act"), the Federal Labor Relations Authority ("the Authority") had exclusive jurisdiction over the matter. Although the Ninth Circuit opinion contains broad language to the effect that the federal courts have no jurisdiction over federal labor relations matters, it does not squarely face the question whether the federal courts have jurisdiction over *damages* actions brought under the Act. As in virtually all of the cases decided under the Act up to the present time, the question before the court in *Columbia Power Trades Council* was whether the Act empowers the district courts to grant *injunctive* relief.[2] The courts which have considered that question have all properly

[2] *See also United States v. Professional Air Traffic Controllers Organization (PATCO)*, 653 F.2d 1134 (7th Cir.1981), *cert. denied*, 454 U.S. 1083, 102 S.Ct. 639, 70 L.Ed.2d 617 (1981); *National Federation of Federal Employees, Local 1263 v. Defense Language Institute*, 493 F.Supp. 675 (N.D.Cal.1980); *Clark v. Mark*, Case No. 69-CV-777 (N.D.N.Y.1980).

concluded that the district courts lack such authority. However, for the reasons expressed in our earlier opinion, we are still persuaded that the federal courts lack jurisdiction over damages actions brought by federal employees against their unions and their employers.

The duty of a union fairly to represent all members of the bargaining unit is inherent in the Act, just as it is inherent in both the National Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.*, and the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* As the Supreme Court has noted,

> "Because '[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit, *Vaca v. Sipes*, 386 U.S. 171, 182 [87 S.Ct. 903, 912, 17 L.Ed.2d 842] (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, 'the responsibility and duty of fair representation.' *Humphrey v. Moore*, [375 U.S. 335,] . . . 342 [84 S.Ct. 363, 368, 11 L.Ed.2d 370]. The union as the statutory representative of the employees is 'subject always to complete good faith and honesty of purpose in the exercise of its discretion.' *Ford Motor Co. v. Huffman*, [345 U.S. 330,] . . . 338 [73 S.Ct. 681, 686, 97 L.Ed. 1048]." That this duty of fair representation under the NLRA may be judicially enforced was made clear in *Vaca v. Sipes*, 386 U.S. 171 [87 S.Ct. 903, 17 L.Ed.2d 842].

United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 67 n.2, 101 S.Ct. 1559, 1562 n.2, 67 L.Ed.2d 732 (1981),

quoting *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564, 96 S.Ct. 1048, 1056, 47 L.Ed.2d 231 (1976). Thus, there was no need for Congress to write into the Civil Service Reform Act of 1978 a section specifically conferring upon the district courts the jurisdiction to hear breach of duty of fair representation cases brought by federal employees. The district courts already have jurisdiction under 28 U.S.C. §§ 1331 to hear claims that the duty of fair representation, which duty arises out of the Act, has been breached.

Plaintiff's claim that his federal employer breached the collective bargaining agreement likewise has "its own discrete jurisdictional base." *United Parcel Service v. Mitchell, supra*, 451 U.S. at 66, 101 S.Ct. at 1566. Such a claim is, in essence, one for breach of contract. *See Vaca v. Sipes, supra*, 386 U.S. at 183-84, 87 S.Ct. at 913. Since, in a non-diversity action, the federal courts lack jurisdiction over contract claims against private parties, Congress needed to create a specific jurisdictional grant whereby private sector employees could sue their employers for breaching a collective bargaining agreement. Congress did so in § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. In contrast, when Congress enacted Title VII of the Civil Service Reform Act of 1978, there was no need to create a new jurisdictional base in order to empower the federal courts to hear breach of collective bargaining agreement claims against federal employers. Under the Tucker Act, the federal courts already have jurisdiction over contract claims against the federal government. As noted in our earlier opinion, the federal courts are thus empowered to entertain claims such as the one plaintiff has brought against the DLI—although the proper forum in the instant case is the Court of Claims and not the district court.

Citing *Yates v. United Soldiers' and Airmen's Home*, 533 F.Supp. 461 (D.D.C.1982), however, the DLI argues that the legislative history of the Act indicates that Congress intended to withhold jurisdiction over damages actions from the federal courts. In *Yates*, the district court held that the federal courts do lack such jurisdiction. In support of its holding, the district court noted that an early version of § 7121(c) of the Act was deleted from the final version of the statute. The deleted passage would have authorized any party to a collective bargaining agreement to seek enforcement of grievance or arbitration provisions in federal court. *See* H.R.Rep.No.1403, 95th Cong., 2d Sess. 286 (1978). In *Yates*, the court interpreted the deletion as evidence that Congress did not intend for the district courts to have jurisdiction over any federal labor relations matters. However, we believe that the deletion of the passage indicates only that Congress did not intend the district courts to have jurisdiction to grant *injunctive relief* under the Act. The deletion of the injunctive relief provision does not indicate any intent by Congress to deprive federal courts of jurisdiction to hear damages claims under the Act.

Nonetheless, the DLI argues that if we assume jurisdiction over damages actions, federal employees will simply convert every labor dispute into a damages action in order to bring suit in federal court. This, the DLI asserts, would defeat the purpose of the preemption of labor disputes by labor boards, which is to "shield the system from conflicting regulation of conduct." *Amalgamated Ass'n of Street, etc. v. Lockridge*, 403 U.S. 274, 292, 91 S.Ct. 1909, 1920, 29 L.Ed.2d 473 (1971). That argument is without merit in the present context. Damages actions are a recognized exception to the rule that

jurisdiction over labor disputes should be vested exclusively in a labor board in order to avoid conflicting regulation. As the Supreme Court noted in *Vaca v. Sipes,*

> A primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation. The doctrine was judicially developed in *Steele* [*v. Louisville & N.R.Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944)] and its progeny, and suits alleging breach of the duty remained judicially cognizable long after the NLRB was given unfair labor practice jurisdiction over union activities by the L.M.R.A. Moreover, when the Board declared in *Miranda Fuel* [*Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (C.A. 2d Cir. 1963)] that a union's breach of its duty of fair representation would henceforth be treated as an unfair labor practice, the Board adopted and applied the doctrine as it had been developed by the federal courts. *See* 140 N.L.R.B., at 184-86. Finally, as the dissenting Board members in *Miranda Fuel* have pointed out, fair representation duty suits often require review of the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery; as these matters are not normally within the Board's unfair labor practice jurisdiction, it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts, which have been engaged in this type of review since the *Steele* decision.

Vaca v. Sipes, supra, 386 U.S. 180-181, 87 S.Ct. 911-912 (footnotes omitted). In the emerging field of public sector labor law, too, maximum consistency of regulation will be achieved if damages actions are heard by the federal courts, which have acquired considerable expertise in handling such cases during the period of nearly forty years in which they have entertained private sector breach of duty of fair representation actions.

The DLI goes on to argue that the federal courts' jurisdiction is superseded by the fact that the General Counsel of the Authority has unreviewable discretion to determine whether a formal complaint should be issued against a union or an employer charged by an employee with unfair labor practices. In the present case, the General Counsel refused to issue a complaint against the DLI. It did decide to issue a complaint against the union, provided that no settlement was entered into. Because the union subsequently did settle with the Authority—in an agreement which afforded no relief to plaintiff as an individual, but which instead established certain guidelines designed to prevent future abuses—no complaint was ever issued against the union by the General Counsel. The DLI argues that the unreviewable discretion of the General Counsel not to issue any complaint in the instant case strips this court of jurisdiction. We disagree.

In the context of private sector labor relations, the General Counsel of the National Labor Relations Board, like the General Counsel of the Federal Labor Relations Authority, has unreviewable discretion to decide whether to issue a complaint against a union or an employer. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-139, 95 S.Ct. 1504, 1510-1511, 44 L.Ed.2d 29 (1975); *Vaca v.*

Sipes, supra, 386 U.S. at 182, 87 S.Ct. at 912. However, that fact does not preclude an employee in the private sector from bringing a damages action against the union and the employer. Indeed, the fact that the General Counsel of the National Labor Relations Board has unlimited discretion to refuse to issue a complaint is precisely why there is a need for a damages remedy against the union and the employer. The Supreme Court made this abundantly clear in *Vaca v. Sipes*:

> The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit. *See, e.g., J. I. Case Co. v. Labor Board*, 321 U.S. 332 [64 S.Ct. 576, 88 L.Ed. 762]. This Court recognized in *Steele* that the congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination. 323 U.S., at 198-99 [65 S.Ct., at 230]. Since that landmark decision, the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. Were we to hold, as petitioners and the Government urge, that the courts are foreclosed . . . from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. *See United Electrical Contractors Assn. v. Ordman*, 366 F.2d 776, cert. denied, 385 U.S. 1026 [87 S.Ct. 753, 17 L.Ed.2d 674]. The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine.

Vaca v. Sipes, supra, 386 U.S. at 182-83, 87 S.Ct. at 912-913 (footnote omitted). Just as in the context of private sector labor relations, then, we must provide federal employees with some means of redressing their grievances against their unions and employers since these employees, their interests subordinated to the interests of the group, are subject to unreviewable decisions by the Authority not to prosecute their grievances.

For the foregoing reasons, the DLI's request that we reconsider our previous decision is hereby denied.

SO ORDERED.

(Karahalios III)

Efthimios A. KARAHALIOS, Plaintiff,

v.

DEFENSE LANGUAGE INSTITUTE FOREIGN LANGUAGE CENTER PRESIDIO OF MONTEREY, and Local 1263, National Federation of Federal Employees, Defendants.

No. C-81-2745 RFP.

United States District Court,
N. D. California
Dec. 31, 1984

Thomas R. Duffy, Richard DeStefano, Duffy & Milgrom, Monterey, Cal., for plaintiff.

William T. McGivern, Asst. U.S. Atty., San Francisco, Cal., Hermes Fernandez, U.S. Dept. of Justice, Washington, D.C., for defendant Defense Language Institute.

Saul M. Weingarten, Saul M. Weingarten, Inc., Seaside, Cal., Patrick J. Riley, Nat. Federation of Federal Employees, Washington, D.C., for defendant Local 1263, Nat. Federation of Federal Employees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PECKHAM, Chief Judge.

I. INTRODUCTION

The plaintiff in this case, Efthimios Karahalios, has for many years been a teacher at the Defense Language Institute (hereinafter "DLI") in Monterey, California.[1]

[1] DLI is a federal agency that provides foreign language instruction to United States military and civilian personnel.

Like the other teachers at DLI, he is within a bargaining unit for which Local 1263 of the National Federation of Federal Employees (hereinafter "the Union") is the exclusive bargaining representative. He is not a Union member, however, and he is not satisfied with the representation he has received from the Union. Specifically, he brought this lawsuit against the Union in 1981, alleging that the Union had mishandled grievances relating to his employment status at DLI, and had thereby breached the duty of fair representation that it owed to him.

He also named DLI as a defendant in his suit, asserting that DLI had refused to arbitrate a grievance he had filed. He maintained that such action constituted a breach of DLI's obligations under its collective bargaining agreements[2] and a violation of his rights to due process and equal protection of the law. The court disagreed with those claims, however, dismissing the equal protection claim and granting summary judgment on the remaining claims against DLI.

But the court declined to grant summary judgment for the Union on plaintiff's claim against it. Thus, that claim proceeded to trial before the court on June 20, 1984. The trial lasted two days, and, at its conclusion, the court took the case under submission for consideration and decision. Having since carefully reviewed the evidence presented and the relevant case law, the court now enters its findings of fact and conclusions of law as set forth below.

II. FINDINGS OF FACT

This dispute arose in 1976, when DLI opened a course developer position in its Greek Department. Two instruc-

[2] DLI and the Union were signatories to collective bargaining agreements dated May 5, 1976 and May 15, 1978.

tors in the Greek Department at DLI sought that position: plaintiff and a man named Simon Kuntelos. For both men, the possibility of being promoted from instructor (pay grade GS-9) to course developer (pay grade GS-11) represented a chance for a substantial increase in pay and prestige.

Both plaintiff and Mr. Kuntelos were well-qualified for the course developer position. Plaintiff had never held the title of course developer, but he had performed course development duties during his long tenure at DLI, and his work had been highly praised. Mr. Kuntelos, in contrast, had previously served as a course developer for DLI for a number of years. He had, however, been demoted to instructor in 1971 when DLI instituted an organizational change eliminating his course developer position.

Upon learning in 1976 that DLI had reopened the Greek Department course developer position, Mr. Kuntelos believed that he was entitled to noncompetitive consideration for that post. DLI did accord him such consideration, but decided not to award him a noncompetitive promotion. It therefore informed Mr. Kuntelos that he could obtain further consideration for the job only by going through DLI's competitive selection procedures, which included a written essay test. Mr. Kuntelos responded to DLI'S decision by refusing to participate in the competitive selection procedures. Consequently, DLI gave him no additional consideration in the hiring process, and, early in 1977, it awarded the course developer position to the only person who went through the competitive selection process: Mr. Karahalios.

Although Mr. Kuntelos did not attempt to secure the course developer position through participation in the

competitive selection process, he did file a grievance against DLI regarding his nonpromotion. In that grievance, he alleged that DLI had not given him proper noncompetitive consideration.

The Union represented Mr. Kuntelos through the first three stages of DLI's grievance procedure, but was unsuccessful in persuading DLI that Mr. Kuntelos' grievance was meritorious. The next and final step in the grievance procedure was arbitration, a step that could be taken only upon approval of the Union.

To Mr. Kuntelos' satisfaction, the Union decided to request arbitration of his grievance.[3] In making that decision, however, the Union did not seriously consider the relative qualifications of Mr. Kuntelos and Mr. Karahalios,[4] or the effect that arbitration might have on Mr. Karahalios' employment status. It neither consulted Mr. Karahalios regarding his course developer qualifica-

[3] Certain evidence in the record arguably suggests that the Union's decision was based on a bad faith policy of favoring Union supporters over other bargaining unit members. Specifically, such an inference could be drawn from Mr. Kuntelos' status as a Union official versus plaintiff's lack of Union membership, Mr. Kuntelos' offer to donate money to the Union if he prevailed in arbitration, and the Union's history of chastising DLI for failing to promote more Union employees (see Plaintiff's Exhibit 42). It is the court's opinion, however, that it need not decide whether to draw that unfavorable inference.

[4] The Union's president, Rogelio Castro, testified that when the Union officials met to consider arbitration of Mr. Kuntelos' grievance, they discussed the number of years that plaintiff had worked, as well as plaintiff's failure to hold the title of course developer prior to his 1977 selection for that post. But such discussion, assuming it took place, hardly constituted a meaningful examination of plaintiff's credentials, especially because it was not based on information, obtained from plaintiff or his personnel file. Moreover, Mr. Castro's testimony before the court was, on the whole, vague and marked by inconsistencies. The court is therefore satisfied that whatever discussion of Mr. Karhalios' qualifications occurred at the Union meeting was minimal and insignificant.

tions, nor determined his qualifications through an examination of his personnel file. Indeed, it did not even inform Mr. Karahalios that Mr. Kuntelos had filed a grievance.

Mr. Kuntelos' grievance went to arbitration before Alvin J. Goldman on June 22, 1977. The Union did not notify plaintiff of the arbitration hearing, and plaintiff did not learn of the hearing until well after it was over. Thus, plaintiff had no opportunity to present his views to the arbitrator.

Arbitrator Goldman rendered his decision on August 4, 1977. He ruled in favor of Mr. Kuntelos, finding that Mr. Kuntelos had not received proper noncompetitive consideration. To remedy that error, he ordered DLI to reconstitute the course developer selection process in accordance with certain guidelines.[5]

Thereafter, DLI gave Mr. Kuntelos another opportunity to take the written essay test that plaintiff had taken. Prior to administering the test, DLI informed Mr. Kuntelos that it would refer him to the selecting official as a repromotion eligible if he obtained a score of 85 or better.

Although the essay test that Mr. Kuntelos took was the same in content as the one that Mr. Karahalios had taken, DLI's testing procedure was different. Whereas Mr. Karahalios had only been given two hours to complete the test, Mr. Kuntelos was given a full three-and-one-half hours. Further, the tests of the two competitors were graded almost a year apart, and, because each man took the test at a time when no others were taking it, the

[5] For the specifics of Arbitrator Goldman's award, see his opinion, which is filed as Plaintiff's Exhibit 3.

graders were aware of whose exam they were grading. Most significantly, however, Mr. Karahalios was not afforded an opportunity to take the exam at the same time and under the same conditions as Mr. Kuntelos.

The graders gave Mr. Kuntelos a score of 83, and Mr. Karahalios a score of 81. Thus, DLI did not refer Mr. Kuntelos to the selecting official as a repromotion. Instead, it referred both Mr. Kuntelos and Mr. Karahalios for competitive evaluation.

The selecting official, Alex Szaszy, considered both candidates and chose Mr. Kuntelos. Accordingly, even though plaintiff had performed satisfactorily in the course developer position for approximately one year, DLI demoted him to the rank of instructor effective May 7, 1978.

Plaintiff then filed two grievances against DLI, one in May of 1978 and one in October of that year. His grievances were lengthy, detailed, and based on numerous grounds. *See* Plaintiff's Exhibits 6 & 7. But one of his major arguments was that DLI should invalidate his demotion because it had used improper testing procedures in selecting Mr. Kuntelos.

Mario Iglesias acted as union representative for plaintiff during the first three stages of the grievance process. Mr. Iglesias believed that plaintiff's grievances were meritorious, yet he was unable to convince DLI of that. On December 20, 1978, DLI completed the third stage of the grievance procedure by denying both of plaintiff's grievances.

Plaintiff then asked the Union to take his grievances to arbitration, and the Union officials met to consider his request. The minutes of that meeting have disappeared, so the details of what transpired are not entirely

clear. It is undisputed, however, that the Union rejected plaintiff's request.[6]

From the testimony at trial, it further appears that the Union did not base its decision on a discussion of the merits of plaintiff's grievances. Rather, it seems to have relied solely on a letter from its counsel advising that arbitrating on plaintiff's behalf would constitute an untenable conflict of interest due to the earlier arbitration for Mr. Kuntelos.[7] Admittedly, the testimony on this point was hardly unambiguous. But the court is confidant [*sic*] that Mr. Iglesias was correct in his assertion that the meeting did not include a discussion of plaintiff's complaints about the testing procedures. The court is also convinced that Mr. Iglesias was not asked to, and consequently did not, describe or comment on the merits of plaintiff's grievances at the meeting. Given the centrality of the testing procedures to plaintiff's grievances, as well as Mr. Iglesias' familiarity with the grievances through his role as plaintiff's representative in the grievance process, those omissions strongly suggest that the Union did not consider the merits of plaintiff's grievances at its meeting. The court therefore finds that the Union's decision regarding arbitration of plaintiff's grievances was grounded on reasons unrelated to the merits of plaintiff's claims.[8]

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[6] Despite Mr. Iglesias' earlier conviction that plaintiff's grievances had merit, the Union's decision was unanimous. Mr. Iglesias testified at trial that he voted against plaintiff in deference to the judgment of the Union's counsel to the advisability of arbitration.

[7] The Union could have remedied the conflict of interest problem by appointing independent counsel for plaintiff to take plaintiff's grievances to arbitration. But it did not do so, even though plaintiff and the Union's counsel had suggested that course.

[8] The court is fully aware that this finding is inconsistent with the representations made in Plaintiff's Exhibit 9, a letter to plaintiff in which the Union's president, Mr. Castro, stated that the Union's decision was based in part on an assessment of the merits of plaintiff's grievances.

After plaintiff discovered that the Union would not take his grievances to arbitration, he attempted to obtain an arbitration without the assistance of the Union. But DLI refused to arbitrate, maintaining that it was only compelled to arbitrate upon receiving a request from the Union.

Plaintiff then sought relief against DLI and the Union from the Federal Labor Relations Authority (hereinafter "FLRA"). He charged that DLI had breached its contract obligations when it failed to arbitrate with him, and the Union had breached its duty of fair representation when it refused to request arbitration of his grievances.

The Regional Director of the FLRA disagreed with both of plaintiff's charges. Plaintiff appealed that decision to the General Counsel, however, and the General Counsel overturned the Regional Director's ruling on the charge against the Union. The General Counsel specifically held that the Union had denied arbitration for reasons unrelated to the merits of plaintiff's grievances, and had thus breached its obligation to represent plaintiff fairly. The General Counsel further ordered the case remanded to the Regional Director for issuance of a complaint, absent settlement.

The remand did not result in relief for plaintiff, however. Rather, the Union entered into a settlement agreement with the FLRA, which simply provided that the Union would post the following notice:

> WE HEREBY NOTIFY OUR MEMBERS THAT:
>
> WE WILL NOT inform employees that where two or more employees are seeking one position, the Union, the National Federation of Federal Employees, Local 1263, cannot represent all such employees in the contractual grievance procedure.

> WE WILL NOT inform employees that it would be a conflict of interest for the Union, the National Federation of Federal Employees, Local 1263, to represent all such employees.
>
> WE WILL NOT in any like or related manner interfere with, restrain or coerce any employees in the exercise of their rights under the Statute.

Plaintiff protested against the settlement, but was unsuccessful in doing so.

Plaintiff then resorted to filing the instant lawsuit. Even before he brought the suit, however, DLI had abolished the Greek Department course developer position due to a lack of funding. Moreover, both plaintiff and Mr. Kuntelos are now close to retirement age. Thus, in applying the law to plaintiff's claim against the Union, the court has been mindful that it would be impossible to effectively reconstitute the course developer selection process a second time.

III. CONCLUSIONS OF LAW

"It is well established that . . . the exclusive bargaining representative of the employees in [a] bargaining unit . . . ha[s] a statutory duty fairly to represent all of those employees. . . ." *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 909, 17 L.Ed.2d 842 (1967). Plaintiff argues that the Union breached its duty to him by: (1) failing to consider his perspective when deciding to arbitrate Mr. Kuntelos' grievance, (2) neglecting to notify him of the Kuntelos arbitration and provide him with an opportunity to be heard at that arbitration, and (3) denying arbitration of his grievances. He seeks damages consisting of lost back pay and lost retirement pay benefits, as well as attorney's fees and costs for the instant suit and the suit before the FLRA.

A. *Breach of the Duty of Fair Representation*

1. *The decision to arbitrate Mr. Kuntelos' grievance.*

When a union becomes the exclusive bargaining agent for a bargaining unit, employees within that unit lose the power to bargain individually with their employer. The purpose of the duty of fair representation is to protect such employees from union abuses. The duty stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca*, 386 U.S. at 182, 87 S.Ct. at 912.

"A breach of the statutory duty of fair representation occurs . . . when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190, 87 S.Ct. at 916; *see also Gregg v. Chauffeurs, Teamsters & Helpers Union Local 150*, 699 F.2d 1015, 1016 (9th Cir.1983); *Robesky v. Quantas Empire Airways Limited*, 573 F.2d 1082, 1086 (9th Cir.1978). Arbitrary conduct is sufficient to constitute a violation; a bad faith motive or intent to hostilely discriminate is not required. *Robesky*, 573 F.2d at 1086. "To comply with its duty, a union must conduct some minimal investigation of grievances brought to its attention." *Tenorio v. N.L.R.B.*, 680 F.2d 598, 601 (9th Cir. 1982). "The thoroughness with which unions must investigate grievances in order to satisfy their duty varies with the circumstances of each case." *Id.*

It is clear, however, that a union's decision on whether to prosecute an employee's grievance must be "inclusive of a fair and impartial consideration of the interests of *all* employees." *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957 (5th Cir. 1976) (emphasis added); *see also Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229, 1236 (8th

Cir.) (en banc), *cert. denied*, 449 U.S. 839, 101 S.Ct. 116, 66 L.Ed.2d 46 (1980). The union must consider "not only the interests of [the grievant] but also those of the . . . employees who would suffer" should the union successfully take the grievance to arbitration. *Tedford*, 533 F.2d at 959; *see also Tenorio*, 680 F.2d at 602.

Thus, when the handling of a grievance deeply implicates the interests of more than one employee, the union should investigate and assess each affected employee's side of the dispute. *See generally Tenorio*, 680 F.2d at 601-03; *Smith*, 619 F.2d at 1237-41; *Automotive, Petroleum & Allied Industries Employees Union, Local 618 v. Gelco Corp.*, 584 F.Supp. 514, 515 (E.D.Mo.1984). For example, when two employees are competing for a position and the union is deciding which employee's position to support, the union must consider the relative qualifications of the employees. *See Gelco*, 584 F.Supp. at 516. In so doing, it may be necessary to inquire of the competitors "about their experience or other qualifications." *Smith*, 619 F.2d at 1240. Failing to take that step may represent a violation of the union's duty of fair representation. *Id.*

Those principles apply to the instant case. The Union's decision to arbitrate on behalf of Mr. Kuntelos had a severe effect on plaintiff, in that it ultimately led to plaintiff's demotion. Yet the Union made no effort to investigate plaintiff's views or qualifications prior to making its decision. Further, the Union showed no concern whatsoever for the consequences that arbitration of Mr. Kuntelos' grievance might have for plaintiff. By demonstrating that level of indifference towards an individual whose interests it was supposed to protect, the Union breached its duty to represent plaintiff fairly.

2. *Failure to notify plaintiff of the arbitration.*

The duty of fair representation not only dictates that unions must adequately investigate employee grievances, but also demands that unions shall, under certain circumstances, impart information to an employee or employees. In particular, a union may breach its duty by failing to convey to an employee critical facts about a grievance affecting the employee. *See Robesky*, 573 F.2d at 1088-91. The union need not withhold such information deliberately to violate its duty; it is sufficient if the union's failure to inform the employee is unintentional but "so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary." *Id.* at 1090.

Courts have applied that standard to situations in which a union has unintentionally failed to notify an employee of the arbitration of another person's grievance. *See, e.g., Smith*, 619 F.2d at 1241-43; *Bond v. Local Union 823, Internat'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 521 F.2d 5 at 9 (8th Cir.1975). The thrust of those cases is that such conduct is arbitrary and illegal if the arbitration could substantially affect the employee's interests, and the employee's position is not adequately presented to the arbitrator. *See Smith*, 619 F.2d at 1241.

Those requirements are met in the instant case. It is indisputable that the arbitration of Mr. Kuntelos' grievance substantially and detrimentally affected plaintiff. Further, there was no testimony at trial demonstrating that plaintiff's position had been adequately presented to Arbitrator Goldman. Accordingly, the Union's failure to notify plaintiff of the arbitration was a second breach of the Union's duty to represent plaintiff fairly.

3. The refusal to take plaintiff's grievances to arbitration.

Plaintiff contends that the Union committed a final breach of its duty when it refused to take his grievances to arbitration. The Union has defended against that claim, however, by asserting that plaintiff had no absolute right to have his grievance arbitrated.

The Union's statement of the law is undeniably correct. "A union is not required to take every grievance of its members to arbitration." *Gregg*, 699 F.2d at 1016; *see also Vaca*, 386 U.S. at 191, 87 S.Ct. at 917. But the Union's defense is incomplete. Although unions need not request arbitration of every employee grievance, their ability to deny arbitration is not unconstrained. Rather, a union's rejection of an arbitration request must be based on "an informed, reasoned judgment regarding *the merits* of the clai[m] in terms of the language of the collective bargaining agreement." *Smith*, 619 F.2d at 1237 (emphasis added); *see also Gelco*, 584 F.Supp. at 515; *Dutrisac v. Caterpillar Tractor Co.*, 511 F.Supp. 719, 726 (N.D.Cal.1981).

No such judgment was made in the instant case. Instead, the Union refused plaintiff's arbitration request for reasons unrelated to the merits of plaintiff's grievance. It thereby breached its duty of fair representation for a third time.

It makes no difference that the Union relied on the advice of its attorney in making its decision to reject plaintiff's request. "Reliance on an attorney's advice [does not] insulate [a] union from liability for . . . breach of its duty to represent its members fairly." *Gregg*, 699 F.2d at 1017. The Union is therefore accountable for its

unfair treatment of Mr. Karahalios, regardless of its reliance on the advice of counsel.[9]

B. *The Remedy for the Union's Breaches*

Having concluded that the Union failed to fulfill its duty to plaintiff, the court must now determine the proper remedy for the Union's misconduct. "The appropriate remedy for . . . breach of a union's duty of fair representation must vary with the circumstances of the particular breach." *Vaca*, 386 U.S. at 195, 87 S.Ct. at 919. Plaintiff has claimed several different elements of damages, which the court analyzes separately below.

1. *Lost back pay and retirement pay benefits.*

The first element of damages plaintiff claims is lost back pay and retirement pay benefits. In deciding whether plaintiff is entitled to recover such damages, it is significant that a union guilty of breaching its duty of fair representation may be held liable only for damages clearly attributable to its improper actions. *Anderson v. United Paperworkers Internat'l Union, AFL-CIO*, 641 F.2d 574, 580 (8th Cir.1981); *Self v. Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 61*, 620 F.2d 439, 444 (4th Cir.1980); *Soto Segarra v. Sea-Land Service, Inc.*, 581 F.2d 291, 298 (1st Cir.1978). Unions may not be held liable for damage awards based on speculation or conjecture. *See, e.g., Bloom v. Internat'l Brotherhood of Teamsters Local 468*, 752 F.2d 1312, 1313 (9th Cir. 1984); *United Steelworkers of America, AFL-CIO-CLC v. N.L.R.B.*, 692 F.2d 1052, 1057 (7th Cir.1982); *DeBoles v.*

[9] Moreover, the Union's course of action was not wholly consistent with the advice of its attorney, Saul Weingarten. Although Mr. Weingarten had suggested that the Union appoint independent counsel to take plaintiff's grievance to arbitration, the Union did not follow that course.

Trans World Airlines, Inc., 552 F.2d 1005, 1017-20 (3d Cir.1977).[10]

For example, in *Self* the Fourth Circuit overturned a district court's order requiring a union to compensate an employee for lost back pay and benefits. 620 F.2d at 443-44. The Court of Appeals explained that the district court's award could not stand because it "rest[ed] on mere conjecture—on the assumption that plaintiffs *might* not have been discharged, or *might* have been reinstated but for the Union's improper action or inaction." *Id.* at 443 (emphasis in original).

Similarly, in *Anderson* the Eighth Circuit disallowed a severance pay award against a union that had made misrepresentations to the employees it was supposed to represent. 641 F.2d at 578-81. The court reasoned that

[10] The Fifth Circuit took a different approach in *Abilene Sheet Metal, Inc. v. N.L.R.B.*, 619 F.2d 332, 348 (5th Cir.1980). In that case, an employee had filed a grievance, which his union had mishandled in a manner that made it impossible to subsequently determine the merit of his grievance.

The majority of courts would have disallowed the employee's recovery due to the uncertainty in the merit of his grievance. But the Fifth Circuit ruled instead that "the uncertainty [should be resolved] against the party that created it by an unlawful act." *Id.*

The Fifth Circuit's principle of resolving uncertainty against the wrongdoer has a certain appeal. Yet this court is also sensitive to the argument that "[s]pecial caution against excessive awards is counseled in the labor law context where a carefully conceived and administered balance between the rights, powers and duties of union, management and individual employee has been established by Congress on a national scale." *Soto Segarra v. Sea Land Service, Inc.*, 581 F.2d 291, 298 (1st Cir.1978). More fundamentally, however, this court need not thoroughly analyze the wisdom of the Fifth Circuit's approach, because the Ninth Circuit has rejected that approach, *see Bloom*, 752 F.2d 1312, 1313 (9th Cir.1984), and this court must follow the lead of the Ninth Circuit, *see Hasbrouck v. Texaco, Inc.*, 663 F.2d 930, 933 (9th Cir.), *cert. denied*, 459 U.S. 828, 103 S.Ct. 63, 74 L.Ed.2d 65 (1982).

"[t]he plaintiffs have not proved that but for [the union's] misrepresentations . . . they would have obtained their severance pay." *Id.* at 580.

The Ninth Circuit's recent decision in *Bloom* provides an additional illustration. In that case, a union made a false promise to its members in connection with the settlement of a labor dispute involving Safeway Stores. The district court held that the union had thereby breached its duty of fair representation and was thus liable for damages "in a measure of the difference between the settlement the union's members actually obtained from Safeway and the settlement they might have obtained by bargaining further instead of believing the union's false promise. . . ." 752 F.2d at 1313 (9th Cir.1984). But the Ninth Circuit overturned the damage award, explaining that "the record did not support the speculative assumption that Safeway would have increased its monetary settlement to the members by $4,000 per person." *Id.*

The circumstances of *Self*, *Anderson*, and *Bloom* are not unlike the ones in the instant case. As in those cases, the court is convinced that the union violated its duty to plaintiff. But, like the courts in *Self*, *Anderson*, and *Bloom*, the court is unable to say with a reasonable degree of assurance that but for the Union's improper treatment plaintiff would have obtained the pay and benefits he claims. The qualifications of plaintiff and Mr. Kuntelos were simply too evenly matched for the court to find that plaintiff had a clear edge over Mr. Kuntelos.[11] Thus, the

[11] In drawing the conclusion that plaintiff's qualifications were not clearly superior to those of Mr. Kuntelos, the court has not overlooked the testimony of plaintiff's son, Athas Karahalios, regarding reanalysis of the written essay test that plaintiff and Mr. Kuntelos took. Athas testified that DLI had scored the test using the scoring guidelines set forth in the

(continued)

court would merely be speculating if it ruled that plaintiff would have retained the course developer job and earned additional pay and benefits had the Union considered his qualifications in connection with Mr. Kuntelos' arbitration request, allowed him to present his views to Arbitrator Goldman, and assessed the merits of his grievances in ruling on his own arbitration request.

February 3, 1977 amendments to a government manual dated July 1, 1976. He further asserted that Arbitrator Goldman had mandated use of other guidelines: the ones in the government manual itself, not those in the February 3, 1977 amendments to that manual. According to Athas, if DLI had used the guidelines in the government manual, Mr. Kuntelos would have received an 83, plaintiff would have received an 85, and DLI would have referred plaintiff to the selecting official as a repromotion, thus ensuring plaintiff's reselection.

There are at least three problems with Athas' argument. First, and most importantly, the argument presupposes that plaintiff's test and Mr. Kuntelos' test can be meaningfully compared. Athas apparently would have this court assume that if any distortion of the results occurred due to the gap in testing dates, the difference in testing periods, and the lack of anonimity [*sic*] in grading, the distortion worked to plaintiff's disadvantage. The court cannot do that, however, because making such an assumption would amount to impermissible speculation.

A further weakness in Athas' analysis is its dependence on the theory that Arbitrator Goldman intended to have DLI ignore the amendments to the July 1, 1976 manual. Arbitrator Goldman's opinion is by no means explicit on that point, and this court is not certain that Athas' interpretation is consistent with the arbitrator's intent.

Finally, Athas' argument rests on the premise that plaintiff would have been selected if DLI had referred plaintiff to the selecting official as a repromotion. While such a result seems likely, the court is aware of no evidence suggesting that the selecting official would have been compelled to hire plaintiff if plaintiff had been referred as a repromotion. Indeed, from Arbitrator Goldman's opinion, it appears that the selecting official would have been free to reject any candidate referred as a repromotion, so long as the selecting official stated his reasons for doing so. Thus, the court would not be justified in using Athas' reasoning as a basis for awarding lost back pay and retirement pay benefits to plaintiff.

Further, at this late date, the court cannot eliminate the need for such speculation by reconstituting the course developer selection process a second time. See p. 445, *supra*. Accordingly, the court has reluctantly concluded that it must deny plaintiff's request for lost back pay and retirement pay benefits.

2. *Attorney's fees and costs.*

In addition to seeking compensation for lost back pay and retirement pay benefits, plaintiff seeks an award of the attorney's fees and costs he incurred in litigating his claims. That request must be considered as two separate requests: one for the attorney's fees and costs he incurred in his litigation against DLI, and one for the attorney's fees and costs he incurred in his suits against the Union.

There is solid support for the former request in the case law. Many courts have held that when a union breaches its duty of fair representation by failing to give proper consideration to an employee's grievance, the employee is entitled to "damages from the union to cover [the] expenses, including attorney's fees and costs, that [he] incurred in seeking a fair resolution of [his] claim against the employer." *Dutrisac*, 511 F.Supp. at 729; *see also Del Casal v. Eastern Airlines, Inc.*, 634 F.2d 295, 301 (5th Cir.1981), *cert. denied*, 454 U.S. 892, 102 S.Ct. 386, 70 L.Ed.2d 206 (1981); *Self*, 620 F.2d at 444; *Scott v. Local Union 377, Internat'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 548 F.2d 1244, 1245-46 (6th Cir.), *cert. denied*, 431 U.S. 968, 97 S.Ct. 2927, 53 L.Ed.2d 1064 (1977). Such an award is "an element of compensatory damages," *Hardesty v. Essex Group, Inc.*, 550 F.Supp. 752, 767 (N.D.Ind.1982); *see also Scott*, 548 F.2d at 1246; *Foster v. Bowman*

Transportation Co., Inc., 562 F.Supp. 806, 818 (N.D.Ala. 1983), and is proper even if it is uncertain whether the plaintiff would have prevailed in his claim against his employer, *see Dutrisac*, 511 F.Supp. at 729. Thus, in the case at hand, the Union is clearly liable to Mr. Karahalios for the amount that Mr. Karahalios spent litigating his claim against DLI before this court and before the FLRA.

Different considerations apply to plaintiff's request for reimbursement of the attorney's fees and costs he sustained in suing the Union. Plaintiff contends that such an award is necessary "to completely redress the [U]nion's breach." Plaintiff's Trial Brief, filed 6/12/84, at 18.

It is clear, however, that "attorney's fees incurred in bringing a [fair representation] action do not arise to the status of compensatory damages." *Cronin v. Sears, Roebuck & Co.*, 588 F.2d 616 at 619 (8th Cir.1978); *see also Hardesty*, 550 F.Supp. at 767. Further, the "American rule," clearly endorsed in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), is that "attorney fees are not ordinarily recoverable by the prevailing party in federal litigation absent statutory authorization," which does not exist for fair representation actions. *Emmanuel v. Omaha Carpenters District Council*, 422 F.Supp. 204, 210 (D.Neb.1976), *aff'd*, 560 F.2d 382 (8th Cir.1977).

Nonetheless, there is an important exception to the "American rule." When a plaintiff's suit confers a substantial benefit on others as well as on himself, courts may grant the plaintiff an award of attorney's fees. *Hall v. Cole*, 412 U.S. 1, 5, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973); *see also Emmanuel*, 422 F.Supp. at 210. That

doctrine, termed the "common benefit rationale," has provided a basis for attorney's fee awards in fair representation actions in which the plaintiff "'necessarily rendered a substantial service to his union as an institution and to all of its members.'" *Harrison v. United Transportation Union*, 530 F.2d 558, 564 (4th Cir.1975), *cert. denied*, 425 U.S. 958, 96 S.Ct. 1739, 48 L.Ed.2d 203 (1976), quoting *Hall v. Cole*, 412 U.S. at 8, 93 S.Ct. at 1947; *see also Emmanuel v. Omaha Carpenters District Council*, 560 F.2d 382, 385 (8th Cir.1977); *Bowen v. United States Postal Service*, 470 F.Supp. 1127, 1132 (W.D.Va.1979), *aff'd in part & rev'd in part on other grounds*, 642 F.2d 79 (4th Cir.1981), *rev'd on other grounds*, 459 U.S. 212, 103 S.Ct. 588, 74 L.Ed.2d 402 (1983).

This is an appropriate case for application of the "common benefit rationale." As a result of plaintiff's litigation before the FLRA, the Union agreed to post a notice advising its members of its obligations when two or more employees seek one position. Plaintiff's litigation thus significantly advanced the interests of individual union members by helping to inform them of their rights. Further, plaintiff's suit before this court involved novel jurisdictional issues regarding the ability of federal employees to bring fair representation action in federal district court. The court resolved those issues in favor of plaintiff, *see Karahalios v. Defense Language Institute, Etc.*, 534 F.Supp. 1202 (N.D.Cal.1982), so plaintiff's suit serves as a valuable precedent for every federal employee who prosecutes a fair representation claim in federal district court. It is clear, then, that "Mr. Karahalios' actions . . . have been responsible for major changes, both nationwide and in [his] local bargaining group." Plain-

tiff's Trial Brief, filed 6/12/84, at 18. Justice therefore requires that plaintiff receive damages for the attorney's fees and costs he incurred in prosecuting this action, as well as in pressing his charges before the FLRA.

IV. CONCLUSION

It is clear to the court that the Union breached its duty to plaintiff on three separate occasions. But the court is unable to compensate plaintiff for lost back pay and retirement pay benefits, because it cannot reliably determine whether plaintiff would have retained the course developer position absent the Union's breaches. The court has reached this conclusion with a certain sense of frustration, yet believes that the circumstances of this case leave it with no alternative course. As DLI Commandant Foster commented, plaintiff was the "innocent victim of circumstances beyond his control." Plaintiff's Exhibit 8.

Although the court has denied plaintiff's request for lost back pay and retirement pay benefits, it grants his claim for reimbursement of the attorney's fees and costs he incurred in his litigation before this court and before the FLRA. Plaintiff shall have until January 31, 1985 to file a detailed accounting of those expenses. If the Union has any objections to plaintiff's accounting, it must submit them in written form by February 14, 1985. Once the period for filing objections has elapsed, the court will determine whether a hearing on the amount of plaintiff's award is necessary.

SO ORDERED.